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Manuscripts and editorial correspondence should be addressed to

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VILMOS PESCHKA (1929–2006)

Professor Vilmos Peschka, editor-in-chief of this review, member of the Hungarian Academy of Sciences passed away on 25 July 2006 at the age of 77. He departed this life as a prominent scholar on legal philosophy during the period following the Second World War in Hungary.

Vilmos Peschka was born at Budapest on 17 December 1929. He graduated from the Law Faculty of Eötvös Loránd University (Budapest), where he obtained a diploma *summa cum laude* in 1954. Between 1954 and 1957 he pursued postgraduate studies in legal philosophy. From 1 September 1957 he was a research fellow at the Institute for Legal Studies of the Hungarian Academy of Sciences up to his retirement in 1999.

Through little short of three decades from 1960 he was teaching civil law at the University of Budapest.

In January 1958 he defended his candidate's thesis (PhD) entitled "Basic Questions of the Theory of Legal Relations" (A jogviszonyelmélet alapvető kérdései) and published by Közgazdasági és Jogi Könyvkiadó in 1960. His second thesis in "Sources of Law and Legislation" (Jogforrás és jogalkotás) he submitted in 1968. He had not yet completed his 50th year when in 1976 he vas elected an associate member of the Hungarian Academy of Sciences, in 1982 he became a full member of the Academy.

Professor Peschka was the most outstanding Hungarian scholar of legal philosophy in the last third of the 20th century, one whose work was a worthy continuation of the activities of three Hungarian Neo-Kantian philosophers of law–Felix Somló, Gyula Moór and Barna Horváth–, who had deserved recognition even abroad in the first part of the last century. Professor Peschka's first greater works, his thesis in the theory of legal relations, had shown his greatest assets, primarily his ability to treat fundamental questions of legal philosophy in such a way as to enable both practicing lawyers and scholars to read his writings with pleasure and benefit. As far back as his early works he had broken with an even levelled criticism at socialist normativism. The fact that he had argued for recognizing the law-making function of the judiciary was

seen as a novel contribution particularly in the Hungarian literature of that period. He maintained that the Supreme Court, by its authoritative rulings handed down while interpreting laws and regulations, was actually making law, postulating, however, that the place in the sources of law and the material boundaries of such judicial legislation were exactly established.

The most productive period of his creative work was marked by the 1970s and the 1980s. He focused his scientific activity on dealing with problems of legal philosophy, while publishing several studies on civil law. His book entitled "Fundamental Problems of the Modern Philosophy of Law" (A modern jogfilozófia alapproblémái)–Gondolat Kiadó, 1972–, which presented the contemporary legal philosophy in Western Europe, can be said to have been a pioneering work under conditions of socialism. It continues to be the best overview in Hungarian of the fundamental issues of legal philosophy and will remain so for long, inasmuch as it has even been published in Japanese (Horicu Bunka Sa Co., Kyoto, 1981) on the basis of the German translation, which was edited under the auspices of Akadémiai Kiadó. It was at that time that his monograph on "The Theory of Legal Rules" (A jogszabályok elmélete) appeared, discussing the theory of legal norms as the most basic notion of law and jurisprudence, and this in a way that it is at least as exciting reading for somebody who is familiar with the philosophy of law as it is valuable and useful to the legal practitioner. This cannot be said except of the truly great works on legal philosophy. Similarly, his writing on "Max Weber's Sociology of Law" (Max Weber jogszociológiája; Akadémiai Kiadó, 1975), which was a pioneering work when published and is a classical one today, is still an exciting read. To Vilmos Peschka the relationship between morality and law was more than a question of legal philosophy, for he, in his writings as well as in his life, was a great moralist, as were many among the philosophers of law negating the inevitable relationship between law and morals. He rejected the views on immanent moral value and justice of law, his experience gave him good reason to do so, but the moral issues, perhaps for that very reason, remained fundamental, to him. This is witnessed by his volume on "The Appeal of Ethics" (Az etika vonzásában; 1980), which is a summary of his writings on ethics. His selected studies were published under the title "Law and the Philosophy of Law" (Jog és filozófia; Közgazdasági és Jogi Könyvkiadó, 1980); they contain his fundamental study "Expediency in the Working Process and in the Legal Norm" (Célszerűség a munkafolyamatban és a jogi normában), which is a basic exposition of his concept of law.

The monograph on "The Special Character of Law" (A jog sajátossága; 1988) is Professor Peschka's comprehensive work on the philosophy of law, one that constitutes a system on the subject. The title is connected in the

reader's mind with György Lukács's great work on "The Special Character of the Aesthetic Quality" (Az esztétikum sajátossága), the reference being no accident as Professor Peschka was also an admirer and follower of György Lukács, but he did not share all of the latter's views. Features common to their mentality were an anti-Stalinist Marxism free from Leninism, which was then called Western Marxism, and the determinate role played by the tradition of the classical German philosophy and of German erudition in general. Professor Peschka was a Marxist but (contrary to Lukács) no Communist. This he spelled out clearly in his writing on the "Marxist and Socialist Theory of Law" (Marxista és szocialista jogelmélet), which was published in 1966. It is a fact that Professor Peschka's lifework is the only worthy equal of György Lukács's, the best-known Hungarian philosopher, in the legal philosophy.

His book of the 1990s entitled "Appendix to, 'The Special Character of Law'" (Appendix, A jog sajátosságához; Közgazdasági és Jogi Könvvkiadó, 1992) was concerned with the achievements of legal hermeneutics.

To Vilmos Peschka the aesthetic quality was a fundamental value. He was passionately fond of literature, and a man of amazingly wide reading. When in company of others, he liked quoting Shakespeare, Goethe, Thomas Mann or, of Hungarian authors, Gáspár Heltai or the poet Endre Ady. The shelves in his Budapest home were overloaded with books in examplary order, including legal and philosophical works as well as classics, Hungarian and foreign, and the latest literary works, being as he was a regular reader of contemporary literature as well. Moreover, he was a lover and connoisseur of music, fine arts and theatre. A friend of his ironically called him an aesthete of law, a "hallmark" he accepted, and rightly so, as he was indeed one.

This was perhaps an added reason that in the 1980s he was chosen to be a co-editor-in-chief of the Academy's Pocket Lexicon (Akadémiai Kislexikon; I-II. Akadémiai Kiadó, 1990), but it was likewise natural that he should have become co-editor-in-chief of the Lexicon of Law (Jogi Lexikon; Közgazdasági és Jogi Könyvkiadó, 1999).

Vilmos Peschka was an active figure of the scientific community both in Hungary and abroad. In former times was a member of several committees of the Hungarian Academy of Sciences. From 1992 he served as editor-in-chief of Acta Juridica Hungarica. Until his death he was President of the Hungarian Section of the International Society of Legal Philosophy (IVR), between 1983 and 1987 he sat on the Board of Directors of that Society, and from 1978 he was a member of the Editorial Board of the Archiv für Rechts- und Sozial-philosophie.

In 2001 he received the Széchenyi Prize, the highest award for scientific life achievement in Hungary.

He was keenly concerned with young people, carefully examining works of his students and promoting their careers with sound pieces of advice. He willingly read manuscripts of any authors seeking his views. Although one of the greatest living Hungarian philosophers of law, he was never allowed to teach philosophy of law at university.

A genuine sociable person, he had many friends, liked friendly gatherings and passionate conversations. Receiving someone into his friendship was considered to be a privilege.

He adored Lake Balaton. Fate was gracious to him, death overtaking him in his sleep while on summer holidays by a beautiful lake-shore.

In duty to his wish, his last repose is in Óbuda Cemetery of Budapest. His burial was attended only by his closest relatives, as he had willed. His friends, students, sometime colleagues, and admirers could not pay the last honours to him except in thoughts.

Vanda Lamm

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IMRE VÖRÖS*

The EU's Constitutional Treaty–Its Development, Structure and Containt

Abstract. The study analyses two questions: the necessity of a European Constitution, and the basic content of the European Constitutional Treaty (with the aim to analyse in a separate study the potential effects of the Treaty on the Hungarian Constitution and its application by the Hungarian Constitutional Court).

Keywords: European constitution, TEU, TEC

Introduction

Though the rejection of the Treaty on the European Constitution in two member states' referenda serves as a serious warning sign to all political decision-makers, this issue must be separated from the scientific value that the Treaty generated and represents. This marks the politically attainable compromise at the level of the European Union today, and it could make the EU's operation more *transparent and democratic,* and would end the *confusion surrounding competencies.* At the same time it could lay the constitutional, "public administrative-institutional" and substantive law foundations for a new EU that progresses in a clearly staked out direction and also carries the *possibility of a new quality* of integration.

The French and Dutch referenda rejecting the Treaty were not about the above considerations: the European Constitutional Treaty has to be regarded as the *communis opinio* that will be unavoidable in the future, as it is considered a significant achievement both in political and scientific terms. Exploring the Constitutional Treaty–as the most recent "swallow" of European law–and its effect on the Hungarian constitutional order is therefore both practical and useful, even if this swallow has "not made a summer" (yet).

1. The European Constitutional Treaty appears to be the result of a fairly recent process–but here the appearance is deceiptive. It is true that the 29th

* Scientific adviser, Institute for Legal Studies of the Hungarian Academy of Sciences, H–1014, Budapest, Országház u. 30.
E-mail: vörös@jog. mta.hu

October 2004 signing of the Treaty establishing a Constitution for Europe (TCE) was preceded by the establishment of a *European Convention* based on the European Council's December 2001 *Laeken Declaration,* and that the TCE's draft took on its final form on 10th July 2003, thanks to the Convention's rather intensive work. *Valéry Giscard d'Estaing,* the president of the Convention, presented the final product to the Italian Presidency-in-office. The Intergovernmental Conference beginning on 4th October 2003 debated the draft and then adopted it, and finally the TCE was signed on 9th October 2004 in Rome.

Were only a mere 22 months necessary for working out and passing the TCE? Obviously *not.* European law, especially European constitutional law, the science of public administration and political sciences have all worked over a decade in preparation of the signing, creation and designing of the TCE.

2. Already since the early 1990s a whole series of scholarly as well as practice-oriented conferences have focused on the necessity of creating a European constitution. Nothing illustrates the urgency of the problem better than the fact that the *Charter of Fundamental Rights* was designed before the TCE, so its text simply had to be inserted into the TCE. This process was also reinforced by the fact that member states' constitutional courts (especially the German and Italian courts), encountered the problem of securing fundamental rights with increasing urgency, which–as I will analyse in more detail below–in turn brought up with growing urgency the issue of the relation between member states' constitutions and European law, in other words the question of primacy.

3. It is impossible to make even a passing reference to each of the innumerable conferences and scientific as well as non-scientific communiqués issued on this subject. Let me just allude to the fact that in addition to the scientific analyses the *European Parliament* adopted a decision on 10th February 1994 (*„Resolution on the Constitution of the European Union").*[1] In this decision–which interestingly (even surprisingly), the 518 member Parliament adopted with an unconvincing majority (155 in favour, 87 opposed, 46 abstentions)–the Parliament refers to its „repeated" request: the European Union needs a democratic constitution. In this context the decision noted with satisfaction that the *Committee on Institutional Affairs* had come up with a *Draft Constitution for the European Union.*

From the scientific side a body called the *European Constitutional Group* presented its own draft constitution,[2] but other groups, too, prepared expertises and drafts.[3]

[1] Document A3-0064/94. OJ C 61, 10. 02. 1994. 155–170. February 10. O. J. 1994.

[2] *A Proposal for a European Constitution.* Report by the European Constitutional Group. London, 1993.

In 2001 the reputed *T.M.C. Asser Institute* in the Hague organised a conference which, looking into the future, focused on the impending *enlargement,* the accession of the 10 new Central Eastern European states and in this context also the issue of the European Constitution.[4]

In 2002 a broad analysis entitled *„Europäisches Verfassungsrecht"* was published[5]–to mention an arbitrarily selected example–which in part presents the theoretical dogmatic foundations of European constitutional law, and in part offers a perspective on future developments. The theoretical-dogmatic foundations touch upon complex issues of the constitutional legislator, federalism, the institutions, sovereignty and the primacy of Union law, European constitutional jurisdiction, the EU's and the EC's constitutional relations, Union citizenship, basic rights, the economic constitution and the unusual term "competition-constitution" (Wettbewerbsverfassung). The future outlook analyses such basic issues as the problem of an EU situated at the intersection of the community's and the member states' legal systems, the legal structure of the EU as an association of states (Staatenverbund), and finally the prospective advantages of a European Constitution.

I. On the need for a European constitution

1. It has been *communis opinio* for quite a while now that the current Treaty establishing the European Community (will be referred to as TEC below) and the Treaty on European Union (TEU), are no longer sufficient as the constitutional foundations of Union co-operation; instead of a "treaty-based constitution" there is a need for a real European constitution.

The notion of a "treaty-based constitution" refers to the fact that the EU *does have* a constitution already: the two *Treaties,* the *Treaty on European Union* (TEU), and the *Treaty establishing the European Community* (TEC). Based on the these two treaties the European Court of Justice (ECJ) has drawn out of the Community law those constitutional safeguards and constitutional principles based on which Community law began to function as constitutional

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[3] *The Shaping of a European Constitution.* Report of the Working Group on the European Constitution. 1990; Kind, P.–Bosco, A. (eds.): *A Constitution for Europe.* London, 1991.

[4] Kellerman, A.–Jaap W. de Zwaan, Czuczai, J. (eds.): *EU Enlargement. The Constitutional impact at EU and National Level.* The Hague, 2001.

[5] von Bogdandy, A. (ed.): Europäisches Verfassungsrecht [European Constitutional Law]. Heidelberg, 2003.

law. In the ECJ's application of law the TEC veritably began to fulfil the role of a *constitutional charter.* In the Court's practice Community law began taking on the functions of a *de facto* constitution in terms of determining the relationship between member states and their citizens, as the Court interpreted (and on this basis applied) constitutional safeguards "into" their relationship with the EC.

2. The *basis* for providing safeguards to citizens/individuals was especially the direct effect of Community law which opened up the possibility of enforcing individual rights in the courts. We refer to safeguards such as *rule of law* („Etat de droit", „Rechtsstaat"): in its prominent and often-cited *Les Verts decision*[6] the Court proclaimed that the requirement for rule of law was a foundation of the EC. Rule of law means that community or member state measures adopted in the EC must be in harmony with the EC's „basic constitutional charter, the Treaty" (i.e. the TEC). Deriving them from the member states' constitutions, the ECJ recognised such principles as the fundamental components of the rule of law, as for instance due process the prohibition of discrimination, the defence of legitimate expectations the prohibition of retroactive effect, the requirement of proportional limitations and good faith in procedures

In addition to demanding the rule of law the ECJ also explicated the separation of powers, democratic governance, the right to judicial and the defence of fundamental rights, as well as defence of the four freedoms of the market as constitutional values.[7] The specialised literature refers to this process as the „constitutionalisation" of Community law, at the same time pointing out that this is something different from the emergence of a nation state's burgeoning constitution. Wechsler, for instance, refers to the TEC's gradual, step-by-step, verdict-by-verdict transformation into a sui generis constitution by virtue of the ECJ's application of it.[8]

3. Naturally this has its own story–as do the books, too (*„habent sua fata libelli"*). The crystallisation of European constitutional principles in no small measure emerges amidst the concerned *„frowning" of member states' constitutional courts.*

3.1. The question arose in the context of how to interpret the primacy of European law in relation to the member states' legal systems, especially

[6] Case 294/83, Les Verts, [1986] *European Court Review*, 1339, 1365.

[7] See for example, Petersmann, E.-U.: Proposals for a New Constitution for the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the EU. *Common Market Law Review*, 1995, 1124.

[8] Wechsler, B.: Der Europäische Gerichtshof in der EG-Verfassungswerdung [The European Court of Justice in the Genesis of the EC Constitution]. 1995. Cited in: Petersmann: *op. cit.* 1142.

constitutions and the constitutional rights and principles safeguarded by those.

The Italian[9] and German[10] constitutional courts both voiced their objections to the absolutist interpretation of the primacy of Community law which held that the latter is above the whole of the national member states constitutions, not only above a significant portion of the constitutional rules and the other internal legal regulations.

3.2. The *Italian Constitutional Court* pointed to the limits of the *priority* of Community law–as laid down and expounded by the European Court of Justice–set by the Italian constitution. In its *Frontini* verdict the court emphasised that even though overall Community law might be above the Italian constitution, it certainly does not enjoy primacy over the constitution's provisions regarding the inalienable rights of individuals and the constitution's fundamental principles. Though Art. 11 of the Italian constitution does regulate the possibilities of transferring or limiting competencies, but at the same time the abovementioned fundamental rights and principles serve as „counterweights" and „counterlimits" (*controlimiti)* to this constitutional option.

In the *Fragd* decision (21st April 1989) the constitutional court reserved its right to review some regulations of Community law with regards to their compatibility with certain human rights articles of the Italian constitution.[11]

3.3. The German Federal Constitutional Court similarly asserted that Community law does *not have absolute primacy* with respect to certain *fundamental rights* protections enshrined in the German Basic Law–as long as Community law does not offer a similar measure of protections; the constitutionality of Community law will be reviewed with respect to the standards laid down by the Grundgesetz (the German constitution). In its famous Solange I verdict the Federal Constitutional Court stated that the Grundgesetz's fundamental law guarantees enjoy priority as "as long as (solange) the competent organs of the Community have not removed the conflict of norms"... between Community

[9] On the primacy of community law see: Várnay, E.– Papp, M.: Az Európai Unió joga [The Law of the European Union]. Budapest, 2005. 82. For the decisions of Italian constitutional court see: de Witte, B.: Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solution for the Applicant Countries? In: *EU-Enlargement. op. cit.*74.

[10] For the "Solange" decisions see for example BverfGE 73, 339. The most recent relevant decision is: BverfG, 2 BvL 1/97. Europäische Zeitschrift für Wirtschaftsrecht. 2000. 702. For the Maastricht decision see. BVerfGE 89, 155. Also see: Várnay–Papp: *op. cit.* 307–312.

[11] Gaja, G.: New Developements in a Continuing Story: The Relationship between EEC Law and Italian Law. *Common Market Law Review,* 1990, 83.

law and the basic law safeguards contained within the Grundgesetz "in accordance with the Treaty mechanism". This means that the Community law's primacy is not unconditional, absolute primacy, but merely conditional. In the 1986 Solange II decision the Federal Constitutional Court observed with relief: given the European Commission's practice regarding human rights and general level of the protection of fundamental rights, the introduction of direct elections to the European Parliament, as well as the fact that all member states joined the European Convention on Human Rights, it finds the situation satisfactory "...as long as (solange) the European Communities, and in particular the case law of the European Court, generally ensure, an effective protection of fundamental rights as against the sovereign powers of the communities which is to be regarded as substantially similar to the protection of human rights required unconditionally by the Grundgesetz..." The Federal Constitutional Court will not make use of its powers in the sense of deciding upon the applicability of secondary community legislation by member states' courts with reference to the German Grundgesetz. In other words the Federal Constitutional Court found that the situation that had emerged (unlike the situation at the time of the Solange I decision) bore no probability of a conflict of norms Community law and the constitutional, especially fundamental right safeguards of the Grundgesetz.

3.4. In *de Witte's* interpretation these statements denote the *thesis of relative primacy* of Community law over member states' *constitutions* and thus they deny the notion of absolute primacy.

4. En route towards the „constitutionalisation" of Community law a crucial stepping stone was marked by the assertion of the *TEU Art. 6 (2)* that the EU respects fundamental rights. In the instance the TEU refers to the European Convention on Human Rights, the general principles of Community law, as well as to member states' common constitutional traditions.

4.1. In view of the above it cannot be regarded as a coincidence, but rather as a significant step in the coherent process of development that the EU decided on drafting its own *Charter of Fundamental Rights.* Nonetheless, this was not always an obvious choice: the drafting of the Charter was accompanied by doubts.

4.2. The question that arose was whether drafting a European Charter of Fundamental Rights would in fact *increase citizens' fundamental rights* as compared to the current situation? The answer was not unequivocal. In *Weiler's* poignant analysis[12] the Europeans are becoming nauseated by the protection of

[12] Weiler, J.: Europe 2000–The Constitutional Agenda. An Outline. In: *EU Enlargement. op. cit.* 10.

fundamental rights: they are protected by the member states' constitutional and regular courts, by the European Convention on Human Rights and its European Court of Human Rights in Strasbourg and by the European Commission. The Commission stated already in 1969 that it finds all community measures that infringe upon the member states' common constitutional tradition unacceptable. Thus primarily one would have to clarify the legal policy goals of such a charter; its undeniable advantage would be that it would make comprehensible and tangible even for the „man of the streets" what so far only jurists–and even among those only a select group–sense and understand. For this very reason Weiler thinks that the creation of the charter might backfire. It could offer a loophole to avoid undertaking anything in this area, in other words it would merely offer an excuse to evade taking necessary steps. In reality the European Community does not have a human rights and fundamental rights *policy and that is the real problem.* What is needed is not the formalisation of rights, but the formulation of a policy for the enforcement and institutionalisation of fundamental rights.

The best counterexample to this is *community competition policy.* Arts 81–82 of the TEC provide the basis of community competition law and therein the guarantee of the internal market's unity. Obviously these articles would be hardly more than rhetoric if the Directorate General No. 4 were not engaged in enforcing these rules. In fact since the introduction of EC Regulation 1/2003–as is well-known–with the decentralisation of the enforcement of competition law the member states' competition authorities (European Competition Network–ECN) and courts have also become involved in implementing the provisions of the two articles.

The situation regarding fundamental rights is similar: it is hardly possible to rely on the courts in this area, as the continuous monitoring of violations, the gathering of information, conducting inquiries or potential „investigations" cannot be a task for the courts, but has to be within the purview of an organisation established for this purpose.

4.3. Similarly, we must also face up to the fact that from a functional perspective the ECJ's current institutional/organisational system is not completely capable of enforcing fundamental rights. Though the ECJ's justices are excellent jurists, few are constitutional lawyers per se. The real problem stems from the fact–and this is where the shadow of new „Maastricht decisions" looms–that it may be within the context of an ECJ decision that the primacy enjoyed by European law over even the most important fundamental rights, and the associated principles and rules guaranteed by member states, are enforced. This, the total subordination of member states' basic law regulation to European law, is problematic and may substantially violate member

states' constitutional „sensibilities". In the final analysis, *Weiler*[13] points out–the ECJ's relation to the member states' courts is rather a lot more complex and of a different nature than the legal standing of the House of Lords or the US Supreme Court in the respective countries' constitutional order.[14] Weiler thus concludes that a separate European constitutional court would be necessary, which could exclusively address issues of constitutional law and thus concentrate on those without dividing its attention among complex internal market, economic, competition law, etc., problems, among which constitutional jurisdiction would be only one of several issues.

4.4. As is commonly known the body charged with drafting the Charter worked out its proposal under the chairmanship of Roman Herzog, formerly president of the German Constitutional Court and then German head of state, and presented its Charter of Fundamental Rights which the intergovernmental conference at Nice *accepted on 7th December 2000.* In the process of drafting the TCE the Charter of Fundamental Rights was then integrated into the document as its *Part II.*

5. The „constitutionalisation" of Community law could therefore be regarded as a process taking place under a kind of member state *compulsion.*

The primacy of Community law cannot be enforced absolutely, if for instance basic law safeguards are insufficient; its relativity on the other hand opens the door to those objections–as formulated in the abovementioned Italian and German constitutional court statements–that primacy exists only in so far as Community law provides the same level of protection as member states' constitutions do. If this is not the case, then constitutional courts reserve the right to potentially declare–according to their own constitutional standards–certain provisions of Community law unconstitutional, thus effectively ordering lower courts in the given member state not to apply it. It is obvious that this line of reasoning implies a judicial review of Community law by the constitutional courts of member states: in effect these bodies can „destroy" Community law depending on whether it is consistent with their own constitution; in this case Community law will not enjoy primacy in the given member state.

The EU was thus *under pressure to act: drafting a European constitution* including safeguards of fundamental rights became *inevitable.*[15]

[13] *Ibid.* 8.

[14] *Ibid.* 8.

[15] Gordos, Á.–Ódor, B.: Their book entitled *Az Európai Alkotmányos Szerződés születése* [(The Birth of the European Constitutional Treaty). Budapest, 2004.] offers useful information on the circumstances of the European Constitution's creation without the difficult dogmatic background above, and also provides a wealth of information on the

6. Still, the debate on the *necessity* of a constitution continued to rage in 2001. On the one hand the phenomenon referred to as „democratic deficit", the lacking legitimacy, was indisputable, as was apparent that the Treaties could not function as real constitutions. The Treaties were too detailed, frequently overlapping, while at the same time from a constitutional legal standpoint they were not differentiated enough. Ultimately, the Union's competencies can only be limited–that is obstacles to the indefinite expansion of these competencies can only be erected–by the way of a constitution.

6.1. Even in light of the above, there was still controversy surrounding the question of whether it was really necessary to formally create a separate, newly worded constitution to address these issues. (An ironic reference comes from *Weiler,* who titles one of the sections in his study „Does Europe Need a Constitution?", while casting doubt on the idea in the next section's title: „Does Europe *really* need a Constitution?"[16]). Weiler believes that a formal constitution would also introduce a formal legislative hierarchy that would deprive European constitutional development of the very advantage that stems from its essence, its peculiar feature deriving from singular historical circumstances: flexibility. The democratic deficit and other problems ought not to be necessarily addressed by drafting a constitution. It would be sufficient to separate the TEU's and TEC's constitutional parts *par excellence,* while preserving the non-constitutional parts as „normal" Community law.

6.2. The fundamental challenge that nonetheless needs to be addressed constitutionally is the question of proportion between intergovernmentalism and supranationalism. In reality this is the basic issue underlying the institutional reform proposals of successive intergovernmental conferences. *Developing the EU* is a rather *paradox process. Wouters*, for instance, sees a shift towards the intergovernmental feature at the expense of supranationalism. In his opinion the Council of Ministers continues to gain ground at the expense of the Commission, a case in point is the memorable participation of an extremist party in the Austrian conservative-led government, when the diplomatic measures taken by the Union were not handled by the Commission, but outside the institutional structure of the EU.[17]

6.3. Even though it is possible to argue with the observation above, the issue of *intergovernmentalism/supranationalism* was always–and presumably

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Hungarian government's position on the relevant issues, as well as the work of the Hungarian representatives at the convention.

[16] Weiler: *op. cit.* 5.

[17] Wouters, J.: Institutional and Constitutional Challenges for the European Union–Some Reflections in the Light of the Treaty of Nice. In: *EU Enlargement... op. cit.* 45.

will be in the foreseeable future–one of the *basic questions* of the EU's development strategy. The magic word can probably be found in the dichotomy of increasing democratic legitimacy *versus* efficient functioning. In this context Wouters points to possibilities such as the appointment of ECJ justices. This is a sensitive issue that no matter how far it strays from the abovementioned "magic word" is still inseparably tied to it: it is an indication of lacking democratic legitimacy that there is no democratic control over the appointment process and thus it is impossible to guarantee that a judge inducted into the body will fulfil all the conditions laid down in TEC Art. 223, in terms of his independence or expertise.

6.4. There is also a lot to be done in terms of the *transparency* of EU institutions to European citizens. Though the modifications introduced by the Amsterdam Treaty–for instance TEC Art. 255's new text–called for guaranteeing citizens' right of access to documents and other data, in reality the exercise of this right is conditional on general principles, so in practice the right of access is rarely enforced.[18] In other words the exceptions need to be narrowed and the exercise of this right needs to be expanded. The ECJ played an important role in this area (as well)–especially in the *Netherlands v.* Commission case[19]–in the "constitutionalisation" of European law. This case and the ECJ's practice are good examples illustrating how the ECJ fits the member states' common constitutional traditions into the EU's constantly evolving "constitutional law."

6.5. The abovementioned democratic legitimacy/democratic deficit and the associated problems of rule of law, the more precise demarcation of competencies and the issue of re-evaluating the role of member states' parliaments all contributed a great deal to the TCE's drafting.

6.5.1. Democratic legitimacy fares best in the *co-decision procedure.* Still, this is the area where the most demands for progress came in. Wouters specifically called attention to the possibility that the European Parliament's role ought to be increased: the Nice Treaty, for its part, did not ensure parallel to the introduction of the qualified majority voting in the Council that it would also be tied to a co-decision procedure, or at least that there would be the possibility of obligatory consultation for the European Parliament.[20] There is no such requirement for the fiscal policy or monetary rules concerning the euro zone, nor for trade in intellectual property. The situation is even worse as far as the second pillar is concerned, though somewhat better in the third.

[18] Wouters: *ibid.* 45.

[19] Case C-58/94 Netherlands v. Council [1996] *European Court Review*, I-2169.

[20] Wouters: *op. cit.* 48.

6.5.2. The question of *rule of law* also raises concerns that provided important arguments in favour of drafting and adopting the TCE. The ECJ in its previously mentioned Les Verts decision and in subsequent decisions emphasised that if we consider the EC or the EU to have rule of law, then this implies–in fact assumes–that there is a system of legal remedies and procedures at the Union level, which neither the EU nor the member states can circumvent, in as far as the review of the legality of the Union's own acts–compared to Community law–is concerned.[21] Given that such a requirement implies the comparison of community's and member states' process of legislation with European law, this practically means the formulation of a requirement for constitutional jurisdiction of sorts. Even though–as we have seen–the ECJ has fulfilled this role almost since its inception and has developed European constitutional principles in the process, including especially the enforcement of basic rights, the obligation for implementing the rule of law will evidently necessitate a set of requirements that extend beyond what has been established hitherto. One such question was in how far individuals can turn directly to the ECJ for the purpose of enforcing their rights–the ECJ's stance on the TEC Art. 230's standing rules is arguably too strict in comparison. Obviously this is about fundamental questions the answers to which–given the deeply constitutional and basic rights nature of the issue–cannot be left (even in part) to the ECJ's practice.[22]

6.5.3. Similarly the TCE drafting was also instigated by the need for a *more precise demarcation of competencies* between the EU and the member states. The *multi level governance system* appeared worthy of consideration. It implies that responsibility be distributed by domains and tasks, divided between different actors who are connected–while sufficiently preserving and securing their autonomy–by efficient institutional links.[23]

6.5.4. The unsolved issue of the *relationship between member states' parliaments and the European Parliament* was also raised, of course. This delicate matter naturally did not come up in the context of modifying or reducing the European Parliament's prerogatives in any way. Parliament (TEC Art. 189) consists of representatives of the Community's member states and is thus one of the most efficient repositories of political democracy.

[21] Case 294/83 Les Verts v. Parliament [1986] *European Court Review*, 1339; also see Case C-2/88 IMM Zwartveld [1990] *European Court Review*, I-3365.

[22] See for example Wouters: *op. cit.* 49.

[23] *Ibid.* 52.

Suggestions to make Parliament bicameral,[24] however (it was not hard to detect that the model for this idea stemmed from the German and Austrian federal parliaments), illustrate the problem well in spite of their stunning nature. A second chamber would–in Wouters' opinion–not reduce Parliament's authority, of course, but rather turn the Council of Ministers into some sort of second chamber, the membership of which would consist of representatives from the member states' governments. The practices used in the co-decision procedure demonstrate, however, that the Council of Ministers–at least from a constitutional/theoretical perspective–already works as a kind of second chamber. In such a system the first chamber would be home to directly elected popular representatives, while the second chamber–and here the example of the German/Austrian, even the American federal system is apparent–would represent territorial/regional governmental interests, as a second chamber constituted on a territorial principle.

6.6. It is indisputable that the problems and ideas above, raised *merely by the way of example*–regardless of how much or in which form they found their way into the TCE–significantly influenced and in some cases and contexts even forced the inclusion of certain ideas into the document.

II. The TCE's content and its main features

The TCE consists of a preamble and four parts. These are complemented by 36 protocols and two annexes.

The Preamble and the first two parts are really the TCE's constitutional content.

1.1. Part I–unlike the others–does not have its own title, even though it contains the rules concerning the Union's nature, its self-specification, organisation and operation.

Part I is divided into nine titles: Title I addresses the Union's definition and objectives, Title II recognises fundamental rights and deals with Union citizenship, IV details the institutional framework and bodies of the EU, the fifth title concerns the exercise of the Union's competencies (including the Union's legislative system, the common foreign, security and defence policy, the rule of law, the solidarity of member states and enhanced co-operation), Title VI bears the name „Democratic Life of the Union", while Title VII addresses finances, VIII good neighbourhood relations, and the final title, number IX dwells on Union membership.

[24] *Ibid.* 53; See also: Horváth, Z.–Ódor, B.: *Az Európai Unió Alkotmánya.* [The Constitution of the European Union]. Budapest, 2005. 28.

1.2. Part II incorporates the Charter of Fundamental Rights adopted earlier.

1.3. Part III deals with Union policies and their operation.

1.4. Part IV contains general and closing dispositions.

The protocols and annexes following the four parts occasionally touch upon very important basic issues, such as the role of national parliaments in the EU, the ECJ's statutes, or the protocol laying down the procedure to be followed in the case of excessive deficits.

2. With respect to its structure the TCE has thus fulfilled expectations: it puts into a well-arranged, clear system...

- the EU's fundamental objectives and values–including the fundamental rights–, its organisational and operational order, as well as
- the EU's policies.[7]

There are two essential areas in which the TCE's content can be grouped.

3. In terms of content the TCE bring changes of great importance: even if its only role had been to formulate–for the first time in the history of European integration–in a generally comprehensive manner the rules in all those areas that the TEU and the TEC address, than it still would have been worth drafting. The overly complex, inscrutable mass of statutes burdened by numerous instances of overlapping primary law is now being replaced by clear regulations that–at least to a certain degree–enable the average citizen to find out what the EU is, if he so wishes.

Selecting any of the many important changes in the TCE is inevitably bound to be arbitrary. Accepting this risk we would like to call attention to the following:

- the EU's basic goals reflect the transition from initial economic integration– the creation and maintenance of a unified internal market, that is the establishment of a certain level of economic union–to political integration (Art. I-3);
- the TCE proclaims the EU's legal personality (Art. I-7), which simultaneously abolishes the–undeniably complicated, but given the continuously ongoing development inevitable–three pillar structure.
- In this context the TCE also lays down the rules for withdrawing from the Union (Art. I-60)
- it clearly (with the high standards one expects from a real constitution) settles the relations between the EU and member states declaring the equality of member states before the TCE (Art. I-5);
- finally establishes in a written legal statute the primacy of Union law over member state law (Art. I-6) .
- the clear tabulation of the EU's competencies (Title III, Arts I-11–18);
- in a structural/institutional context the TCE establishes the permanent position of an European Council President (I-22), as well as that of a Union Minister for Foreign Affairs (I-28);

– the TCE achieves a veritable breakthrough with its reform of decision-making procedures: it limits the number of those areas in which unanimity is required (in effect curtailing the scope of member state vetoes) and creates the institution of qualified majority, the so-called dual majority, in the decision-making process (Art. I-25);

– the TCE gives greater weight to the European Parliament by expanding its competencies (Art. I-46 provides the basis);

– it introduces the institution of popular initiative [Art. I-47 (4)], as a manifestation of participatory democracy;

– the TCE's Part II includes among its constitutional provisions the Charter of Fundamental Rights with its enumerated basic rights–which is absolutely essential for any document aspiring to the rank of a constitution–, thus pre-empting the abovementioned potential source of friction between the EU and member states' constitutional courts.

4. Though in terms of its legal classification the TCE is a treaty between subjects of international law, and can only be modified with their consent and through consensus, it was nonetheless undoubtedly created with the intention of setting up a constitution.

When we are asked to take a position on the question whether this could be considered a constitution in the traditional constitutional law sense of the word, then it certainly appears to be a waste of words–one might say hair-splitting–to look for the attributes of a nation-states' constitution in this document. This is a unique process in European history whose legal, constitutional representation cannot be undertaken with traditional legal or constitutional categories. Undoubtedly, a traditionally understood constitution would have to talk of a traditionally understood sovereign state and, correspondingly, of the people constituting it, who are the source of said sovereignty. In this context we cannot talk of a state-constituting people–the European people. But this does not imply that the TCE, in its own specific range of tasks, in the very specific, historically determined set of problems it needs to address, could not fulfil the function of a basic law, or to put it better: a „Basic Law".

The TCE determines the constitutional framework for those fundamental questions that are not handled by primary legislation: the TEU and the TEC, which would be repealed once the TCE takes effect (the Euratom Treaty is the only one that would not be affected by the TCE's potential adoption). The EU is not a „state" in the traditional sense and thus the debate whether it can be made to fit the "confederation of states" or "federal state" mould seems nonsensical. The EU is genuinely a sui generis formation, with the intermediate characterisation „invented" by the German Federal Constitutional Court (a kind of neither this nor that): the „Staatenverbund". Correspondingly this non-traditional forma-

tion of states cannot have a traditionally understood constitution, but it can have a „constitutional treaty" based on an international treaty between the member states.

This peculiarity is well expressed in the compromise name that the document finally received: *„Treaty establishing a Constitution for Europe".*

The category and institution of the „treaty-based constitution"–introduced and analysed above (see I.1)–as a living, already practically existing "constitution" (within the conceptual framework outlined above), cannot be immediately replaced by a "real" constitution as it is traditionally understood, with all the regular features of a constitution, for that would require a federal state that is compatible with traditional constitutional law categories. At the current stage of development there is no sign of such a state, however. The TCE's undoubtedly small, but at the same time determined and significant steps in this direction cannot change the fact of lacking *sui generis* state formation. The "Constitutional Treaty" replacing the "treaty-based constitution" captures the complexity of the integration process, its historically unique nature, even at the level of a wordplay, and it also expresses the notion that in the given situation this "product" best represents the reality of the attainable level of integration–now and in the foreseeable future as well.

In our opinion the TCE therefore–with all its compromises–adequately reflects the current state of economic and political development: the state in which the EU–consisting of economic and political union–is right now and will be in the foreseeable future and medium term.

This is not only no small achievement, but also the attainable maximum–if it is attainable at all in light of the integration process. But not even the TCE itself sees this as the end of the road.

5. The Preamble clearly expresses the nature of the European unification process: Paragraphs (2)–(3)–(4) („wishes to deepen"; „united ever more closely"; „...continue the work accomplished within the framework of the Treaties establishing the European Communities and the Treaty on European Union, by ensuring the continuity of the Community acquis,") all indicate that integration is on the path of preservation through cancellation.[25] The TCE's goal is thus not to finally conclude for the long-term a continuously evolving process–and it could not do that even if it wished to do so–but to further develop the results

[25] See the TCE's critical analysis in: Czuczai, J.: Some Points Concerning the EU Constitution from a Hungarian Perspective. In: Curtin, D.–Kellermann, A. E.–Blockmans, S. (eds.): *The EU Constitution: The Best Way Forward?* T. M. C. Asser Institut. The Hague, 2005. 433–445; on the preservation through cancellation: Szigeti, P.: *Az Európai Alkotmányszerződés hatása a Köztársaság Alkotmányára* [The European Constitutional Treaty's Impact on the Constitution of the Republic]. Special edition. 225.

accomplished so that a Union of 25 will be capable of flexibly serving the goal of integration at least in the medium-term.

5.1. Though the TCE was criticised immediately following its adoption for being "overly centralised", the truth is that it preserves the intergovernmental nature of the development process–the TCE is an international treaty that can only be amended unanimously, based on a consensus of all member states. The Preamble [Paragraph 4] talks of a Europe "United in diversity", making clear that unified Europe is based on the preservation of the member states' national identity [Preamble Paragraph 3].

These are not just the typical generalities common in preambles: Part I, Title I, Art. I-1–that is the TCE's first rule on establishing the Union–clearly states the EU's competencies are derived from the member states who confer on the Union their own competencies, which in turn practices it on a "Community basis".

5.2. The second notion in the Preamble is the strengthening of democracy and transparency in the EU's public life–and the TCE does indeed live up to these expectations.

5.3. The Preamble finally refers to the values that the EU subscribes to and then later details in Part I Title I Art. I-2: the TCE begins with a commitment to the values of human rights, democracy, equality and the rule of law. These values are complemented in Art. I-2 by the individual rights of persons belonging to minority communities, pluralism, a general prohibition of discrimination, tolerance, social justice, solidarity, as well as the declaration of gender equality.

6. The TCE's "individual" boundaries are set by the fact that the European Union established by this Treaty (Art. I-1) is successor to the current EU and the EC (Art. IV-438). Correspondingly, with the taking effect of the TCE, the TEU and the TEC are repealed, as are the Accession Treaties. Separate detailed rules regulate the issue of territorial scope.

7.1. In addition to the EU's aforementioned values we also find the summary rules concerning the EU objectives here – many of which we have already encountered in the context of the TEC introductory regulations. One such goal is, for instance, the well-being of its peoples. Aside from such general statements we also find a statement on the "two unions": Art. I-3 (2) includes among the Union's objectives the notion that the EU is an area with both, political union (without internal frontiers, with freedom, security and justice), and economic union (an internal market where competition is free and undistorted). These two constitute the real EU, the summary term for which is the "European Union".

The common feature of the two partial unions is that they seek to realise a social market economy, promoting social solidarity, economic and social cohesion and solidarity between the member states.

7.2. It is important to point out that the TCE puts a great deal of emphasis on the *rule of law,* as one of the fundamental attributes of the EU: up to Art. I-3 this category is mentioned thrice, in the Preamble, in Art. I-2, and in Art. I-3, (2) listing the EU objectives. It is obvious here that this is not merely the TEU, the TEC or the acquis which "show up again", but the member states' common constitutional traditions as well. The text's emphasis, however, is to set fundamental conditions concerning potential future enlargements, which–due to their safeguard character–(rightly) raise the bar very high for potential new member states and candidate countries (Romania, Bulgaria, Croatia, but especially Turkey). Though as an aside one could point out that there are sources of law that not only fail to satisfy these requirements but–we shall return to this below–straight-out contradict them.

7.3. The clear, comprehensible repetition of the *four freedoms* is–finally!–mentioned together with the *prohibition of discrimination.*

7.4. Art. I-5 of the TCE states another well-known proposition: the principle of *member state's* obligation to co-operate [Art. I-5, (2)], but this is preceded by the statement on the equality of member states before the "Constitution"–this is how the TCE refers to itself at this point!–, as well as the respect for their national identities [Paragraph 1].

7.5. Art. I-6 finally declares the *primacy of Union law:* what this means is the primacy of the law "adopted by the institutions of the Union in exercising competences conferred on it" over the legal order of the member states. The TCE does not mention the relationship between its own provisions and the member states' constitutions–leaving this "thorny delicacy" to the member states' constitutional legislators. As is known, the Republic of Hungary has significant outstanding debts in this area–*the primacy of European law over the Hungarian Constitution ought to finally laid down in the Constitution.* Unless this happens the issue cannot be regarded as concluded. We will return to this issue further below, as with the TCE's potentially entry into force settling this long-delayed question may become completely inevitable for the Hungarian constitutional legislator.[26]

[26] For further information see: Vörös, I.: Az EU-csatlakozás alkotmányjogi: jogdogmatikai és jogpolitikai aspektusai [The constitutional, legal dogmatic and legal policy aspects of EU accession]. *Jogtudományi Közlöny,* 57 (2002) 397; Kecskés, L.: Magyarország EU-csatlakozásának alkotmányossági problémái és a szükségessé vált alkotmánymódosítás folyamata. [The constitutional problems of Hungary's EU accession and the

7.6. Art. I-7 declares the EU's legal personality, thus the Union become a *subject of international law.*

7.7. Title II of Part I, referring to the Charter of Fundamental Rights contained in Part II, recognizes basic *rights–with two clarifications.* On the one hand the TCE additionally also refers to the European Convention on Human Rights, as well as the common constitutional tradition of member states. This means that in applying and interpreting the Charter of Fundamental Rights–the TCE's Part II–these two legal texts have to be considered.

The fundamental rights, if properly applied and interpreted, are therefore part of the Union's legal order.

What this means is that in applying Union law one always has to pay attention to fundamental rights, as those constitute the fundament of the whole European legal order as its core principles. In our opinion their classification as core principle means that Part II, containing the fundamental rights, on the one hand also incorporates concrete applicable measures, and on the other hand–as supplementary feature in the case of loopholes, for instance–is also a repository of general principles that ought to be considered when applying European law. The basic rights are therefore the *lex generalis* of European legal order, which influence the application and interpretation of any *lex speciali.*

7.8. The TCE's beneficial effect is inestimable in the sense that it subsumes the first two of the three effective treaties (TEU, TEC, Euratom Treaty), in a *single "treaty"*, thus repealing them (the Euratom Treaty is not affected by the TCE). The Treaty on the European Coal and Steel Community (ECSC Treaty) lapsed on 23rd July 2002 as the fifty years its validity had been envisioned for had expired, but the majority of its provisions live on in the TEC.[27]

This means that the EU's *primary law* becomes codified in a single document, which marks a *fundamental change* in terms of its effects. The European legal order, the EU's structure, institutions and operations have become transparent, clearer and more easily comprehensible. This is reinforced by Art. IV-438 which pronounces *succession:* the successor of the EU and the EC established by the TEU is the EU established by the TCE:

The situation of secondary law is different: those remain in force. The same applies for other elements of the acquis, as well as the ECJ's and the Court of First Instance's decisions, which continue to preserve their source of law character.

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process of the constitutional amendments necessitated thereby]. *Európai Jog,* 2003/ Nos. 1 and 3., 21–30. and 22–23.

[27] See Horváth–Ódor: *Az Európai Unió Alkotmánya. op. cit.* 58.

8. The TCE brings significant changes: *simplification* and *increased transparency in the system of sources of law.* Title I Chapter I talks of the Union's legal acts within the framework of "Common Provisions", and significantly simplifies the extremely complex, nigh inscrutable system. The TCE's articles I-33–I-39 introduce four legally binding and two legally non-binding so-called legal acts. Dogmatically it is odd that the TCE does not refer to the legislative system but to "acts", and it is odder still that it distinguishes between legally binding and non-binding acts. It would be a substantial error if the text were to talk about legally non-binding sources of law, but the designations of "acts" benevolently conceals the dogmatic slip-up. We return to the problem later to analyse its effect on the Hungarian constitution.

A legally binding act is the European law (which corresponds to the current first pillar regulation), the European framework law ("successor" to the directive)–these so-called legislative acts [Art. I-33 (1)] have general applicability.

A European regulation differs from legislative acts in that it serves their implementation and thus, depending on which law's implementation it was issued to serve, it could have 'European law' content, that is immediately binding content, or it could have "framework law" content, meaning in essence that it only obliges member states to pursue certain goals but leaves the choice of adequate tools up to them.

The *European decision* is not necessarily generally, but a binding executive act. A decision can designate specific addressees, and in such a case it is only binding for them.

The TCE preserves the institutions of *legally binding recommendations and opinions,* but through enshrining them in the constitution it inaugurates them as constitutional institutions. According to the position delineated by the Hungarian Constitution and the Hungarian *Constitutional Court* this is a *very worrisome practice*; we will return to our concern about the integration of these institutions into the constitution further below.

9. We will not delve further into the TCE's detailed contents, as the objective of the present study is not to provide a full commentary on the TCE but to assess its *likely effects.* Beyond the abovementioned effects we will therefore in a separate study concentrate on some specific problems, with special attention to their impact and mutual feedback effects on the Hungarian Constitution and the practice of the Hungarian Constitutional Court.

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PHOEBUS ATHANASSIOU*

What's in a Name? Linguistic Diversity, EMU and the Single Currency

Abstract. Linguistic arguments were in some of the new Member States invoked to justify national variations in the spelling of the name of 'euro' while, in others, a 'sovereign right' was claimed to spell that name in accordance with national language rules and usage traditions. Examining these claims against the background of the current Community language rules and of the exceptions and limitations to the 'principle of linguistic equality' inherent in these rules, this article will argue that, while the issue of the spelling of 'euro' is not one of language, even if it were to be conceived as such, the Treaty objectives served by a 'single name for the single currency' should prevail over arguments in favour of national variations of its name.

Keywords: linguistic diversity, single currency, Economic and Monetary Union

I. Introduction and legal framework

The European Union (EU) is founded on 'unity in diversity': diversity of cultures, national identities and local customs. As language is a fundamental component of national identity, the concern of the EU with the preservation of linguistic diversity represents both a political necessity and a question of principle for the Community Institutions.[1] The EU's interest in the promotion of linguistic diversity is also intimately linked to the distinct nature of primary and secondary Community legislation and, in particular, to its supremacy over national law[2]

* Scientific Legal Counsel, European Central Bank, Frankfurt am Main, Germany. The views expressed in this article are purely personal and do not represent those of the European Central Bank.
E-mail: phoebus.athanassiou@ecb.int

[1] According to Art. 6 Treaty on European Union, the EU shall 'respect the national identities of its Member States'.

[2] In Case 6/64, *Flaminio Costa* v *E.N.E.L.* [1964] European Court Review 585, the European Court of Justice ruled that the signature of the Treaty operated a transfer of Member State powers to the Community that entailed a permanent limitation of their sovereign rights and signalled their commitment to observe Community even against conflicting national laws.

and to its direct effect,[3] core features of Community law that cannot assert themselves otherwise than against the background of a fully multilingual EU.[4] The EU's commitment to linguistic diversity can also be explained in terms of the latter's instrumentality as a legal certainty guarantee: the obligation to draft and present Community legislation in a language that the citizens of Europe can comprehend is so fundamental that the EU's respect for the Member State languages not only serves legal certainty purposes but, ultimately, also contributes to the protection of the rule of law.[5] Finally, linguistic diversity is rightly deemed to enhance democratic representation,[6] transparency and accountability by facilitating interaction between the Community Institutions and EU citizens and enabling public access to Community documents.[7] As a result, linguistic diversity represents one of the most prominent characteristics of the EU as a *sui generis* 'supranational' organization, distinct from traditional international entities and ordinary federal structures.[8]

Notwithstanding the fact that linguistic diversity is most intimately associated, whether historically, politically or legally with the European integration project, that its importance was already inherent in the text of the Treaties establishing the European Community (the 'Treaty') and the European Atomic Energy

[3] The principle entails that, not only Treaty provisions (subject to the conditions stipulated by the European Court of Justice in *van Gend & Loos, ibid*), regulations and decisions (pursuant to Art. 249 Treaty on European Community) but also directives can conditionally be invoked by Member State nationals, in their own language, before national courts, as a direct source of rights and obligations that can be enforced against Member States or other individuals.

[4] See Vedaschi, A.: *Istituzioni europee e tecnica legislativa.* Milano, 2001. 90.

[5] The first recital to the preamble to the European Constitution bears an express reference to the rule of law as one of the universal values of Europe's heritage.

[6] See the preamble to the European Constitution thereto, read in conjunction with Art. I-10 (Citizenship of the Union).

[7] Under Art. 255 Treaty on European Community, 'Any citizen of the Union ... shall have a right of access to European Parliament, Council and Commission documents'. In the same vein, Art. 21 Treaty on European Community provides that 'Every citizen of the Union may write to [any of the Community Institutions or bodies] in one of the [official languages] and have an answer in the same language.

[8] After the 2004 enlargement, the number of the official languages of the Union has reached 20. From 1 January 2007, Irish will also be an official Community language. The planned accession to the EU of Bulgaria and Rumania will bring this figure to 23. By contrast, the UN uses 6 official languages for its intergovernmental meetings and documents while both the Council of Europe, with a current membership of 45, and NATO, with a membership of 26, use English and French only as their official languages.

Community,[9] and that the core value attaching to its protection has since been emphasized in the Charter of Fundamental Rights of the European Union (the Charter),[10] in the text of the Treaty establishing a Constitution for Europe (the 'European Constitution')[11] and, more recently, in a Commission Communication on multilingualism,[12] even a cursory examination of the Community language rules suffices to reveal the absence of a comprehensive set of provisions dealing with all the different aspects of the interplay between the tasks of the EU, on the one hand, and the role of languages in their performance, on the other, as well as a consistent EU-wide language policy setting out specific standards against which to measure the EU's performance with regard to the use, preservation and promotion of languages.[13] As a result, the ascertainment of the existence or otherwise of a Community 'principle of linguistic equality' and its precise demarcation are largely questions of interpretation for the Community Institutions, for the Member States and, ultimately, for the European Court of Justice ('ECJ').

Arts 21, 314 and 290 of the Treaty and Regulation No 1/58, as amended by successive Acts of Accession (the Regulation),[14] set out the legal basis for multilingualism in the EU.[15] Art. 290 of the Treaty instructs the Council to

[9] The reference is to the notion of the 'equal authenticity' of the texts of the Treaties in the official languages of the Member States, enshrined in Arts 314 Treaty on European Community and 225 Euratom, as affirmed by all subsequent Accession Treaties.

[10] According to Art. 22 of the Charter, an important reference document for the interpretation of Community law, '[T]he Union shall respect cultural, religious and linguistic diversity' and in Art. I-3 of the Treaty establishing a Constitution for Europe: '[The Union] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'.

[11] O. J. C 310, 16. 12. 2004, 1.

[12] 'A New Framework Strategy for Multilingualism', Commission Communication of 22 November 2005, [COM(2005)596, available at http://europa.eu.int/languages/en/document/74]. The document reaffirms the Commission's commitment to multilingualism, explores the various aspects of its language related policies and sets out a new framework strategy for multilingualism with proposals for specific actions.

[13] See Shuibhne, N. N.: *Does the Draft EU Constitution Contain a Language Policy?*, http://www.ciemen.org/mercator/pdf/simp-shuibhne.pdf .

[14] O. J. B 17, 6. 10. 1958. 385, as last amended to award to Irish and to three regional languages in Spain a reduced language status

[15] Art. 314 Treaty on European Community provides that 'This Treaty, drawn up in a single original in the Dutch, French, German, and Italian languages, all four texts being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which shall transmit a certified copy to each of the Governments of the other signatory States. Pursuant to the Accession Treaties, the Danish, English, Finnish, Greek,

unanimously take decisions on the rules governing the languages of the Community Institutions 'without prejudice to the provisions contained in the Statute of the Court of Justice'. It was on the basis of this Art. that the Regulation was adopted. Besides enumerating, in Art. 1, the official and the working languages of the Community Institutions, the Regulation *inter alia* provides that a) documents which a Member State or a person subject to the jurisdiction of a Member State sends to the Community Institutions may be drafted in any of the official languages selected by the sender, the reply being drafted in the same language, whereas documents which an institution sends to a Member State or to a person subject to its jurisdiction must be drafted in the language of that Member State (Arts 2 and 3); b) regulations and other documents of general application must be drafted in the 20 official languages (Art. 4); c) the Official Journal of the European Union (the 'Official Journal') must be published in the 20 official languages (Art. 5); d) the Community Institutions may stipulate in their Rules of Procedure (RoP) which of the languages are to be used in specific cases (Art. 6); e) the languages used in the proceedings of ECJ must be laid down in its RoP (Art. 7); f) if a Member State has more than one official language, the language to be used must, at that Member State's request, be governed by the general rules of its law (Art. 8).

The Regulation allows the Community Institutions a fair degree of latitude in the selection of their particular language regime, provided that this is set out in their respective RoP.[16] Because of this, but also because of the different needs and objectives of the different Community Institutions, the Regulation has been interpreted differently by each of its addressees, as will become apparent later in this paper. Further sources of limitations to the application of the principles of the Regulation, developed later in this paper, are the ECJ

Irish, Portuguese, Spanish and Swedish versions of this Treaty shall also be authentic'. Similarly, Art. 3 of the Treaty of Accession 2003 provides that 'This Treaty, drawn up in a single original in the Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will remit a certified copy to each of the Governments of the other Signatory States'.

[16] It is important to note that the Community Institutions' freedom of choice (a) relates to their working language(s) only; and that (b)it is in all cases subject to the political constraints inherent in selecting one or more languages as their working languages. In the case of the European Central Bank, for instance, its RoP do not expressly identify English as the European Central Bank's working language, in view of the reaction that an explicit reference to that language might perhaps have generated.

case-law on the Community Institutions' and bodies' language regime and the national choices of Member States with more than one official language.

II. The spelling of 'euro': A Community competence or a language question?

A) Background to the debate

The name of the single currency and of its decimal subdivision[17] were determined by the Heads of State or Government at the 1995 Madrid European Council meeting. The importance of choosing, before the start of Stage Three of Economic and Monetary Union (EMU), a name for the new currency that would be simple, symbolic and uniform across Member States was acknowledged early on as an essential requirement for a smooth currency changeover and, ultimately, as a determinant of the EMU's public acceptability.[18]

The significance of the name of the single currency was reiterated in Recital 2 of the Council Regulations establishing the legal framework for the introduction of the euro.[19] The consistent reference in their texts to 'differences in alphabet' suggests that the original intention was not merely to prevent Member States from unilaterally adopting divergent 'national' names for the single currency but, also, to oblige them to uniformly spell 'euro', subject

[17] Although Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (O. J. L 139, 11. 5. 1998, 1) requires the same name of the subdivision of the euro to be used in all official languages, written or oral deviations exist in several Member States, including in the case of Greek small denomination coins which, instead of 'EURO CENT', read *leptó* or *leptá* (the old 100th part of a drachma) on their national side. Oral deviations can be explained by reference to recital 2 to Council Regulation (EC) No 974/98, *inter alia* stating that 'the definition of the name "cent" does not prevent the use of variants of this term in common usage in the Member States'.

[18] 'The name of the single currency must be the same in all the official languages of the European Union, taking into account the existence of different alphabets; as of the start of Stage 3, the name given to the European currency shall be euro. This name is meant as a full name, not as a prefix to be attached to the national currency names' (Conclusions of the European Council Meeting in Madrid, at 'I. Economic revitalization of Europe in a Socially Integrated Framework, A. Economic and Monetary Union, I. The scenario for the changeover to the single currency', available at http://europa.eu.int/european_council/conclusions/index_en.htm).

[19] See Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (O. J. L 162, 19. 6. 1997, 1) and Council Regulation (EC) No 974/98.

nevertheless to the use of a different alphabet in one of the Member States.[20] Although it is plausible to presume that the legislator's concern was first and foremost with references to the single currency's name in *legal* texts, there is little to suggest that any formal spelling distinction was ever envisaged between legal documents, on the one hand, and documents intended for the general public, on the other, not least because such a distinction might subvert legal certainty. At the same time, issues relating to the pronunciation of the words 'euro' and 'cent' were presumably not intended to be addressed, if only because to impose specific rules in this respect would lie beyond the remit of the Community. The conclusion that the emphasis was on *spelling* rather than on *pronunciation* is also consistent with the Regulation.

Although there is no indication that anything short of the uniform spelling of the name of the single currency was ever intended, at least in official usage, a number of linguistic concerns, initially with regard to the spelling of 'euro' on banknotes and coins, but also in connection with the grammar and formation of plurals of 'euro' as used in other official texts, have been voiced by Member State representations in EU fora[21] and expressly highlighted in an annex to the European Constitution.[22] In one Member State[23] a legal act establishing a 'national' spelling of the name of the single currency was adopted while, in

[20] The reference is to Greece where the name of the single currency is spelt *'EYPΩ'*. The planned accession to the EU of Bulgaria will signal the inclusion of the Cyrillic alphabet into the 'alphabets officially used in the European Union', as per the Declaration by the Republic of Bulgaria on the use of the Cyrillic alphabet in the European Union to the Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union (O. J. L 157, 21. 06. 2005, 392).

[21] See, for instance, the ECOFIN meeting of 6 November 2004, held after Member State and EU officials discovered that there had been translation disparities in the spelling of the name of the single currency in several official language versions of the two Council Regulations establishing the framework for the euro and in the text of the 2003 Accession Treaty and of the European Constitution ('euras' in Lithuanian, 'eiro' in Latvian, 'evro' in Slovenian and 'euró' in Hungarian).

[22] The reference is to a declaration by Latvia and Hungary on the spelling of the name of the single currency appended to the European Constitution whereby: 'Without prejudice to the unified spelling of the single currency of the European Union referred to in the Treaty establishing a Constitution for Europe as displayed on the banknotes and on the coins, Latvia and Hungary declare that the spelling of the name of the single currency, including its derivatives as applied throughout the Latvian and Hungarian text of the Treaty establishing a Constitution for Europe, has no effect on the existing rules of the Latvian and the Hungarian languages'.

[23] The reference is to Latvia.

another three Member States,[24] either a 'national spelling' *only* is being used in national legal acts or the 'national' and the official spelling are being used interchangeably. Objections to the uniform spelling of the name of the single currency have been expressed in yet another Member State.[25]

Three questions inevitably arise. The *first* is whether the spelling of 'euro' is a language issue, in which case linguistic and non-discrimination arguments might be of relevance. A *second* question is whether Member States can legitimately claim a right to spell the name of the single currency in line with their distinct linguistic traditions. A *third*, and perhaps more fundamental question, is whether convincing arguments can be canvassed against the permissibility of national variations in the spelling of 'euro', on account of the utility of the uniform spelling of the name of the single currency and of the actual existence of several other limitations to the 'principle of linguistic equality', similar in logic to those which this article argues should prevail in connection with the issue of the spelling of 'euro'. The following sections will examine each of these questions in turn.

B) The spelling of 'euro' as a question of language and its link to non-discrimination

To determine whether or not the issue of the spelling of 'euro' is one of language, in connection with which non-discrimination arguments can legitimately be invoked, we propose to briefly examine the link between the EU's remarkable linguistic diversity and the rationale underlying the EU's concern with non-discrimination.

An enquiry into the rationale of the regulatory action of the EU in the field of languages suggests that the common thread that runs through all of the relevant Community legal rules, including, in particular, Art. 21 TEC and the provisions of the Regulation, and which informs the policy of the Community Institutions on this question, is the Community's concern to avoid language-based discriminations against Member State nationals, likely to have an impact

[24] The reference is to Hungary, Lithuania and Slovenia.

[25] The reference is to Malta, where the National Council for the Maltese Language (NCML) recently proposed that the name to be locally used for the single currency should be 'ewro' (report available at: http://www.kunsilltalmalti.gov.mt/filebank/documents/reportonthenamesoftheeuropeancurrency.pdf). Under Art. 5(2) of the Maltese Language Law, the NCML is the supreme language authority in Malta, with a duty to 'update the orthography of the Maltese language as necessary and, from time to time, establish the correct manner of writing words and phrases which enter the Maltese language from other tongues.'

on their everyday lives, whether by rendering their access to Community legislation, procedures and information more difficult, or by discouraging language learning and societal linguistic diversity or by subverting the promotion of a thriving, multilingual economy. It follows that, perhaps, the only type of 'discrimination' that one can meaningfully invoke when discussing issues of relevance to the linguistic diversity debate, relates to discrimination which is the result of restrictions likely to adversely affect the ability of the public to interact with the Community Institutions in their mother tongue or to invoke Community legislation or to exercise their citizenship rights and Treaty freedoms.[26] In this respect, the Community's concern with avoiding language discrimination is no different from its concern with avoiding discrimination on any other grounds.

Turning to the issue of the content of the principle of non-discrimination, it is noted that, while secondary Community law has prohibited both direct and indirect discrimination since the early days of European integration, what it did not expressly do was to provide an actual definition of the underlying concept.[27] The principle was subsequently elaborated on and applied by the ECJ, notably in the fields of the free movement of labour and occupational gender equality. The gradual expansion of the scope of the Community law prohibition on discrimination continued with the Treaty of Amsterdam,[28] which considerably broadened the range of prohibited types of discrimination, without, nevertheless, risking a definition of their 'common features'.[29] Building on the case law of the ECJ and on the progress achieved through the Treaty of Amsterdam, new discrimination-targeted secondary Community legislation has been enacted

[26] Particularly as regards the importance of the protection of linguistic rights for the preservation of the free movement of persons, the European Court of Justice has stated that, in the context of a Community based on the principle of the free movement of persons, 'the protection of the linguistic rights and privileges of individuals is of particular importance' (Case 137/84, *Mutsch* [1985] *European Court Review*, 2681, at paragraph 11 and Case C-274/96 *Bickel and Franz* [1998] *European Court Review*, I-7637, at paragraph 13).

[27] In particular, Council Regulation No. 1612/68 of 15 October 1968 on the free movement of labour within the Community and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of gender equality in relation to access to employment, training, promotion and work conditions.

[28] O. J. C 340, 10. 11. 1997, 1.

[29] Art. 13 of the Treaty of Amsterdam empowers the Community to take action to deal with discrimination based on a whole new range of grounds, including racial or ethnic origin, religion or belief, age, disability and sexual orientation.

in recent years.[30] However, while the list of non-discrimination grounds is not definitive and notwithstanding that the principle of non-discrimination is likely to be applied, in the future, more broadly,[31] the fundamental requirements for its ascertainment, namely, the existence of an unlawful differential treatment and the establishment of a prejudice to the legitimate interests of one or more individuals, have, throughout, remained unchanged.

An examination of the 'language issues' that the question of the spelling of the name of the single currency raises and of the alleged discrimination inherent in the Member State obligation to spell its name uniformly, reveals the lack of any relation, direct or indirect, between these and the rationale that underlies the EU's concern with the protection of languages, as a particular aspect of its general non-discrimination policy. This is because the element of 'discrimination' is absent from the equation. It should be remembered that the name of the single currency is an *artificial* word, selected as a matter of convention in view of its symbolic resonance, which is no more closer to Greek than it is to Hungarian or to any other official language of the Union, in a way such as to suggest a bias in favour of one or more and to the detriment of one or more other official languages and of the Member State nationals that speak them as their native tongues. It was precisely in order to avoid this eventuality that an artificial name, rather than, for instance, one reminiscent of the name of an actual currency, past or present, was eventually retained.

It follows that, because it does not, *stricto sensu*, raise equal treatment questions, the issue of the spelling of the name of the single currency is not, properly speaking, a language issue in connection with which arguments inspired from the concern with avoiding discrimination against Member State nationals and, more particularly, from the respect of the EU for Member State languages, can legitimately be invoked.

[30] These include Council Directive 2000/43/EC of 29 June 2000 on the implementation of the principle of equality without reference to racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 on the creation of a general framework for equal treatment in employment and occupation, and Council Directive 2002/73/EC of 23 September 2002 amending Directive 76/207/EEC on the implementation of the principle of gender equality in relation to access to employment, training, promotion and work conditions.

[31] The EU's commitment to the principle of non-discrimination was recently reaffirmed in the Charter which, in Art. 21, prohibits discrimination on the 6 grounds listed in Art. 13 Treaty on European Community, as well as on 7 additional grounds namely, social origin, genetic features, language, political or other opinion, membership of a national minority, property and birth. In common with Art. 12 Treaty on European Community, Art. 21 of the Charter prohibits discrimination on grounds of nationality.

C) EMU and Member State sovereignty

Even if it were possible to treat the issue of the spelling of the name of the single currency as one of language, so that arguments inspired from the EU's respect for linguistic equality and diversity could legitimately be relied on in support of claims against the uniform spelling of its name, one should not loose sight of the impact on the debate of the 'institutional' aspect of the challenge to the uniform spelling of 'euro', in view of the allocation of competences, in the field of the EMU, between the Community and the Member States.

It should be remembered that, far from simply representing a supranational economic policy co-ordination framework, the EMU is so intimately linked to the European integration project that, Member States have voluntarily agreed to transfer to the Community Institutions and the ECB a host of critical decision-making powers in the areas of economic and monetary policy. While the resulting challenge to the classical notion of national sovereignty is, perhaps, unprecedented, the transfer to the EU level of supreme authority over economic and monetary policy matters has consistently been treated as a *sine qua* non condition for attaining closer economic and, ultimately, political integration among Member States.

The name of the single currency, while not a monetary or economic policy issue in itself, was the outcome of a political agreement in the field of the EMU, a field of exclusive Community competence under the Treaty. As the exclusive holder of competence in monetary matters, it is only natural that the Community alone should determine the name of the single currency.[32] Consequently, it cannot be argued that the Council has acted *ultra vires* and in breach of the principle of subsidiarity in decreeing, through the legal acts establishing the framework for the introduction of the euro, the spelling of the name of the single currency in the languages of the Member States.

It should also be remembered that, pursuant to Art. 5(3) of the Treaty of Accession 2003,[33] the 'new' Member States are expressly bound to comply, as

[32] This is confirmed by Art. 123(4) Treaty on European Community, according to which the designation of the name of the single currency falls within the sole competence of the EU Council sitting in the composition of the euro area Member States.

[33] This unequivocally provides that: 'The new Member States are in the same situation as the present Member States in respect of declarations or resolutions of, or other positions taken up by, the European Council or the Council and in respect of those concerning the Community or the Union adopted by common agreement of the Member States; they will accordingly observe the principles and guidelines deriving from those declarations, resolutions or other positions and will take such measures as may be necessary to ensure their implementation'.

a matter of law, with the Madrid European Council political agreement, as this was part and parcel of the *acquis communautaire* at the time of their accession. An *ex post facto* challenge to the validity of the European Council decision on the definition of the name of the single currency would therefore be repugnant to the rationale of the *sui generis* Community legal order,[34] not least because it would be directed against an agreement reached by a body which, albeit not enjoying the status of an Institution, is often considered as a key source of gravitas in the European integration process, responsible for providing 'the Union with the necessary impetus for its development' and for 'defining the general policy guidelines thereof'.[35]

It follows that the 'sovereign right' effectively claimed by some of the Member States to spell the name of the single currency in accordance with their linguistic rules and usage traditions appears to be inconsistent with the exercise by the Community of its exclusive competences in the field of the EMU and, for these reasons, contrary to first principles.

D) Qualifications to the 'principle of linguistic equality'

A linguistic equality backed challenge to the uniform spelling of the name of the single currency postulates that the 'principle of linguistic equality' has the status of an absolute Community law principle from which no derogation is possible. However, an enquiry into the Community language rules suffices to reveal the existence of a wide range of qualifications to that principle. The origins of these *de facto* and *de jure* qualifications can be traced back to a multitude of sources, including primary and secondary Community law, the case law of the ECJ and the CFI and the language regime of the Community Institutions. Taken together, these qualifications suggest not only that there is no absolute 'principle of linguistic equality' within the EU but, more importantly, that, to the extent that such a principle *does* exist, this is subject to a number of exceptions or restrictions the logic of which is no different in nature to the one which this article suggests should prevail with regard to the issue of the spelling of the name of the single currency. The following

[34] In Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v *Netherlands Inland Revenue Administration* [1963] European Court Review 1, [1963] Common Market Law Reiew 105, the European Court of Justice ruled that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields'.

[35] Art. 4 Treaty on European Union.

paragraphs will examine each of the principal sources of qualifications to the 'principle of linguistic equality'.

a) Primary and secondary Community law qualifications to 'linguistic equality'

As we have seen earlier in this paper, the legal basis for the implementation of multilingualism by the Community Institutions is laid down in Arts 21, 314 and 290 TEC and in the provisions of the Regulation.

An enquiry into the Treaty basis for multilingualism and, more particularly, in Art. 21 TEC, reveals the existence of a number of restrictions in the language rules of the EU. Art. 21 TEC, the most far reaching of the relevant Treaty provisions, guarantees the right of every EU citizen to write to any of the Community Institutions or bodies in any of the languages stipulated in Art. 314 TEC, receiving an answer in the same language. However, Art. 21 TEC covers *written* communications only, *provided* that these have been initiated by a citizen of the EU, thereby excluding from its scope oral and written communications initiated by third country nationals, resident in the EU. Furthermore, Art. 21 TEC refers to Community Institutions *only*, excluding other Community agencies or bodies from its scope of application. Finally, Art. 21 TEC covers communications initiated from *natural* persons only, thereby excluding legal persons from its scope of application.

A closer examination of the Regulation, which enumerates the 'official and working' languages of the Community Institutions, guarantees communications between the Community Institutions, the citizens and the Member States in all official languages and stipulates that regulations and other documents of general application must be drafted in all official languages, also reveals the existence of a number of inbuilt qualifications to its principles. Thus, the Regulation refers to the language regime of the Community Institutions *only*–thereby excluding from its scope of application other EU agencies or bodies–and acknowledges *national* official languages only–thus excluding from its scope of application regional languages.[36] Moreover, the Regulation only addresses the *written* use of languages, offering no guidance in connection with *verbal* communications between the Community Institutions and the outside world. Last but not least, Art. 6 of the Regulation acknowledges that the Community Institutions have the power to implement their general language regime, in accordance with the principles outlined in the Regulation itself, by stipulating in their Rules of

[36] The 'official version' of multilingualism guaranteed by the Regulation has drawn criticism: see Yves, P.: *Managing or Celebrating Linguistic Diversity in the EU* (2004) http://www.iec.umontreal.ca/pubicationsfr_fichiers/COLLOQUE-2004/IvesIESfinal.pdf.

Procedure (RoP) *which* of the official languages of the Union are to be used in specific cases, while Art. 8 gives Member States with more than one official national language the choice of deciding whether or not all of these languages will enjoy the status of a 'working' language of the Union, reserving nevertheless for the Council the procedure for their establishment, in accordance with the general rules of the law of the Member State involved.

Taken together, these limitations significantly qualify the claim that the principles enshrined in the Treaty or the Regulation establish an absolute Community 'principle of linguistic equality'.

b) Judicial qualifications to 'linguistic equality'

The case law of the ECJ and the CFI are similarly inconsistent with the interpretation that the principles enshrined in the Treaty or the Statute establish an absolute Community 'principle of linguistic equality'.

In *Kik v OHIM*[37] the Court of First Instance (CFI) held that the language rules laid down in the Regulation do not amount to principles of Community law and do not embody a specific, Community law 'principle of linguistic equality' that cannot legitimately be derogated from: to decide otherwise would be to disregard the character of the Regulation as secondary law.[38] On appeal,[39] the ECJ confirmed that Art. 314 TEC does not enshrine an absolute Community law principle of 'equality of languages', adding that even where an individual decision is published in the Official Journal, only the language of the relevant procedure will be authentic and can be used to interpret that decision.[40] It follows that, because no absolute value attaches to the provisions of Art. 314 TEC, there will be circumstances where documents intended to produce legally binding effects can legitimately be drafted in *some* of the official languages of the Union only, carrying equal weight and authenticity as

[37] Case T-120/99, *Kik v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* [2001] European Court Review II-2235, paragraphs 58 to 59.

[38] This interpretation is consistent with the language of both Art. 290 Treaty on European Community and Art. 6 of the Regulation, of which the former enables the Council to amend the rules governing the languages of the Community Institutions and to establish different language rules as it sees fit, while the latter expressly recognises the Community Institutions' freedom to stipulate in their RoP which of the official languages of the Union will be used in specific cases.

[39] Case C-361/01 P, *Christina Kik* v *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2003] European Court Review I-08283, paragraph 82.

[40] *Ibid,* paragraph 87.

tools for the interpretation of legislative intention.[41] The ECJ further held[42] that the language regime of an Institution or body will occasionally be the result of a delicate balancing act between conflicting interests, requiring the engineering of linguistically appropriate solutions to practical difficulties, and concluded that the Council's choice, in the case of the OHIM, to treat differently some of the more widely used official languages, was appropriate and proportionate.

In a recent Opinion,[43] Advocate General Maduro stated that, notwithstanding the fundamental importance of the concept of linguistic diversity and its status as an EU-wide institutional rule, it is impossible to infer the existence of an absolute principle of equality between Member State languages as there will be circumstances, which must nevertheless be 'justified on every occasion',[44] where this principle will not prevail: 'It is necessary to accept restrictions in practice, in order to reconcile observance of that principle with the imperatives of institutional and administrative life. But those restrictions must be limited and justified. In any event, they cannot undermine the substance of the principle whereby the Community Institutions must respect and use all the official languages of the Union'.[45] Advocate General Maduro distinguished between (i) communications between the Community Institutions or bodies and citizens of the EU, where the principle of linguistic diversity deserves the highest level of protection and cannot be subject to restrictions resulting from 'technical

[41] It is implicit in the European Court of Justice ruling that, while Art. 21 Treaty on European Community embodies a Community law principle (a specific expression of the general principle of equality and non-discrimination on grounds of nationality under Art. 12 Treaty on European Community), Art. 314 Treaty on European Community, to which Art. 21 Treaty on European Community refers, is not a general Community law principle, since the latter's focus is on the protection of the rights of individual citizens while that of Art. 314 is on the duties of the Community Institutions in their external relations or internal operations.

[42] Case C-361/01 P, *Christina Kik* v *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2003] European Court Review I-08283, paragraphs 92–94.

[43] Opinion of Advocate General Maduro in Case C-160/03 (*Spain* v *Eurojust*) of 16. 12. 2004. The Opinion reviews the relevant principles and case-law and is one of the rare occasions where the issue of the languages of the Community Institutions and bodies has been dealt with by the European Court of Justice to such length. In its judgment, delivered on 15 March 2005, the European Court of Justice declared the application for annulment brought by Spain under Art. 230 Treaty on European Community inadmissible and did not, for that reason, examine the issue of the compatibility of the linguistic recruitment requirements of Eurojust with the language regime of the EU.

[44] *Ibid.* at paragraph 38.

[45] *Ibid.* at paragraph 40.

difficulties which an efficient institution can and must surmount';[46] (ii) the administrative procedures of Community Institutions or bodies, where 'certain restrictions based on administrative requirements' will be tolerated, as long as the interested parties have been put in a position where they can properly take note of the position of the Institution concerned;[47] and (iii) rules on the internal functioning of Community Institutions or bodies, where the choice of the language to be used for internal communication 'is the responsibility of those institutions'[48] as long as the basic reasons of administrative efficiency behind a limited number of working languages do not result in an internal language regime that is entirely dissociated from the rules governing the external communication of the Community Institutions or bodies and do not undermine the essence of linguistic diversity.

c) Institutional qualifications to 'linguistic equality'

The discretion that the Regulation grants to the Community Institutions in the application of its principles has led to the establishment of several different working language regimes, one by each of the Community Institutions, designed to reflect their distinct business requirements and external communication needs. These inevitably challenge the linear application by the Community Institutions of the 'principle of linguistic equality'.[49]

The European Parliament has repeatedly affirmed its commitment to the pursuit of multilingualism as a condition of democratic representation and as an integral part of European culture, worthy of protection. Its language rules are laid down in Rule 138 of its RoP[50] which establishes not one but *two* distinct regimes, broadly corresponding to the division of the Parliament's work between public deliberations and committee work. Thus, while a fully multilingual regime applies to plenary sessions, multilingualism is less consistently pursued in connection with committee and certain delegation meetings. Given that committee hearings is where most of the preparatory work leading to the adoption of Community legislation takes place, it is possible to treat the provisions of Rule 138 as significant qualifications to Parliament's practice of multilingualism.

[46] *Ibid.* at paragraph 43.

[47] *Ibid.* at paragraph 44.

[48] *Ibid.* at paragraph 46.

[49] For a recent, detailed examination of the application of multilingualism by the Community Institutions and the European Central Bank, see Athanassiou, P.: The application of multilingualism in the European Union Context. *European Central Bank Legal Working Paper Series* (2006) No. 2, http://www.ecb.int/pub/pdf/scplps/ecblwp2.pdf

[50] 16th edition, July 2004, available at: http://www2.europarl.eu.int/omk/sipade2?PROG=RULES-EP&L=EN&REF=TOC.

The language regime of the Council is *prima facie* characterised by the application of full multilingualism, both because the Council represents the interests of Member State governments and because its main function is to adopt legislation.[51] The language rules of the Council are laid down in Art. 14 of its RoP,[52] according to which regulations and other documents of general application cannot validly be adopted or enter into force unless drafted in all the official languages of the Union.[53] However, Art. 14 allows for derogations from the language rules in force, where the Council has unanimously decided to waive their application 'on grounds of urgency'.[54] Further limitations apply at lower levels within the Council, including within the Committee of Permanent Representatives,[55] and in a number of other Council preparatory bodies.[56]

Except for a few and relatively vague references to 'official', 'working' and 'authentic' languages,[57] the RoP of the Commission[58] are silent on the issue of its language regime. Notwithstanding the Commission's commitment to multilingualism, as evidenced in its recently adopted Action Plan[59] and Communi-

[51] Art. 202 Treaty on European Community.

[52] O. J. L 106, 15. 4. 2004, 22.

[53] Under Arts 251 and 252 Treaty on European Community, the same rule applies to Council common positions which cannot be communicated to the Parliament unless adopted in all official languages.

[54] Derogations may be used in the first few months after the accession of new Member State where a revised translation in an official language is difficult to obtain within the specified period. Whenever the Council has recourse to an Art. 14 derogation, its decision is to be recorded in the Council minutes and, where appropriate, the Council should make efforts to thereafter adopt the missing language version(s).

[55] The Comité des Representants Permanents operates on the basis of an informal, mostly trilingual, language regime (English, French and German), although documents submitted to it are occasionally available in other official languages.

[56] Ahead of the 2004 enlargement, the Seville European Council asked the Council to study the question of the use of languages and to consider practical means of improving the situation, without prejudice to basic principles. Further constraints to the provision of full translation and interpretation arrangements have since been introduced to ensure that the Council can cope with post-enlargement demands.

[57] Under Art. 18 of the RoP of the Commission: 'For the purposes of these Rules, "authentic language or languages" means the official languages of the Communities in the case of instruments of general application and the language or languages of those to whom they are addressed in other cases'.

[58] O. J. L 308, 8. 12. 2000, 26.

[59] COM(2003)0449 final. This was the Commission's response to the December 2001 Parliament resolution referred to above. On 27 July 2003 the Commission adopted its Action Plan 2004–2006 for the promotion of language learning and linguistic diversity. The Action Plan (i) makes concrete proposals for 45 measures to be taken between 2004

cation,[60] the most supranational of the Community Institutions has, due to its composition and operational requirements, opted for a more restricted language regime. Thus, while full translation and interpretation are made available in formal occasions and public *fora*, the *de facto* working languages of the Commission are limited to English, French and, to a lesser extent, German, also depending on the policy that is being dealt with. This limited working language regime is nevertheless without prejudice to the discharge by the Commission of its legislative initiative tasks in all the official languages of the Union or to the Commission's commitment to practise multilingualism in its external communications.[61]

The language regime of the ECJ differs from that of the other Community Institutions.[62] Underlying the ECJ's commitment to multilingualism is its concern with providing access to justice and ensuring the effective protection of the rights that individuals derive under Community law. Art. 29 of its RoP provides that the 'language of a case' can be any of the official languages of the EU, including Irish, as determined by the applicant.[63] In proceedings involving a preliminary ruling, the language of the case is that of the national court or tribunal which has requested the preliminary ruling and is to be used in written

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and 2006 with the threefold objective of extending the benefits of language learning to all EU citizens as a lifelong activity, improving the quality of language teaching and building a language-friendly environment in Europe and (ii) proposes a series of actions to be taken at European level with the aim of supporting actions taken by local, regional and national authorities.

[60] See footnote 13.

[61] See also Principle No 4 of the 'Code of good administrative behaviour for staff of the Commission in their relations with the public' ('Dealing with enquiries'), pursuant to which: 'In accordance with Art. 21 Treaty on European Community establishing the European Community, members of the public who write to the Commission shall receive a reply to letters in the language of the initial letter, provided that it was written in one of the official languages of the Community'.

[62] The *sui generis* nature of the European Court of Justice's language regime is acknowledged in Arts 290 Treaty on European Community and 7 of the Regulation.

[63] Certain exceptions apply where the defendant is a Member State or a natural or legal person having the nationality of a Member State (the language of the case coincides with the official language of that State; where that State has more than one official language, the applicant may choose between them), where the parties jointly request the use of another official Community language or where a request by one of the parties for the use of another official Community language has exceptionally been granted by the European Court of Justice (on the understanding that such a request cannot be submitted by an Institution).

and oral pleadings by the parties and in supporting documentation.[64] However, while the ECJ's judgments are issued in the official languages of the Union, and although Judges and Advocates General may use any language or require the translation of any document into the language of their choice,[65] internally the ECJ deliberates in French only (this also is the language of its internal administration). The use of a single working language, while no doubt intended to help avoid extensive cross-translation and to ensure the consistent use of vocabulary, represents a notable limitation to the ECJ's practice of multilingualism.

It follows from Art. 24 of the RoP[66] of the Court of Auditors that its audit reports and opinions must be made available in all the official languages of the Union when due for publication in the Official Journal of the European Union (OJ). Letters from the President and other observations as well as documents forwarded officially to the Community Institutions or governed by the Staff Regulations are translated into all official languages of the Union, in common with documents intended for general circulation, such as Court of Audit brochures, documents providing information on its work or documents for internal use and circulation to the national audit institutions. However, in common with the ECJ, the dominant internal working language of the Court of Audit is French (although English and German are also used but to a lesser extent).

d) Exceptions to 'linguistic equality' in the case of certain national and regional Member State languages

Although the official (and, by implication, also the working) languages of the Community Institutions generally coincide with the official languages of the Member States, there are some exceptions to this rule in the case of Member States with more than one official languages. The particular situation of these languages adds a further qualification to the application of the 'principle of linguistic equality' within the EU.

[64] It follows from Art. 31 of the European Court of Justice RoP that documents drawn up in the 'language of a case' or in any other language authorised by the European Court of Justice, under Art. 29, are regarded as authentic and cannot be challenged on language grounds.

[65] RoP of the European Court of Justice, Art. 29 (3).

[66] O. J. L 81, 20. 1. 2005. 3.

Irish, the "first"[67] national language of Ireland was, until recently, not recognised as an official Community language,[68] although the Treaties and the European Constitution,[69] were already drawn up or officially translated into Irish.[70] The status of the Irish language had originally been determined by an agreement under the terms of which Irish was to enjoy the status of a 'Treaty language', meaning that the Treaties would be officially translated or drawn up in Irish, while Irish would be listed in the Treaties as an authentic language. In this regard, the status of Irish within the EU was unique. Further to Ireland's request in November 2004, the Council unanimously adopted a Council regulation that recognizes Irish as the 21st official Community language from 1 January 2007.[71] The Community Institutions' obligation to adopt and publish regulations and other documents of general application in Irish is nevertheless subject to a partial[72] and temporary derogation.[73]

Luxembourgish, Luxembourg's national language,[74] is another example of an official national language which is not an official Community language. However, unlike with Irish, Luxembourgish has never been recognised as an authentic, 'Treaty language'.

Following the accession of Malta to the EU, Maltese, Malta's 'first' national language,[75] became an official and a working language of the EU.

[67] Under Art. 8 of the Irish Constitution, in the event of a conflict between the Irish and the English language texts of the Constitution, the Irish text prevails.

[68] See Art. 1 of the Regulation which does not include Irish among the official and working languages of the Community Institutions.

[69] The European Constitution formalised the designation of Irish as a Treaty language and, also, changed the existing official and working language dichotomy by introducing a third language designation ('Constitution's languages'–see Art. I-10(2)(d)).

[70] See Arts 53 Treaty on European Union and 314 Treaty on European Community.

[71] See press release for the 2667th session (13 June 2005) by the European Council, General Affairs and External Relations. Council Regulation (EC) No 920/2005, O. J. L 156, 18. 6. 2005. 3.

[72] Under Art. 2 of Council Regulation (EC) No 920/2005 of 13 June 2005 (O. J. L156, 18. 6. 2005. 3.) the derogation does not apply to regulations adopted jointly by the European Parliament and the Council.

[73] Under Art. 2, ibid, the derogation is for a renewable five year period beginning on the day on which the amending Council Regulation applies.

[74] *Loi sur les régimes des langues*, 1984, Art. 1. Under Luxembourg law, legislation is drafted in French only, although Luxembourgish, alongside French and German, can be used for court proceedings and administrative purposes.

[75] Under Art. 74 of the Maltese Constitution, *"(E)very law shall be enacted in both languages and, if there is any conflict between the Maltese and the English texts of any law, the Maltese shall prevail"*. This rule does not apply to those acts which expressly provide

However, as it was technically impossible to guarantee the drafting in Maltese of all regulations and other documents of general application adopted by the Community Institutions, a partial[76] and temporary[77] derogation similar to the one referred to above in our discussion of the particular situation of Irish, has applied from the Community Institutions' obligation to draft and publish such acts in Maltese.

Turning to the situation of regional languages, the reader will recall that, by acknowledging only *national* official languages, the Regulation excludes from its scope of application languages enjoying official status in part only of the territory of certain Member States. Considering that, apart from the 20 official Community languages, the number of regional and other 'minority' languages spoken across the territory of the EU exceeds 60 this restriction in the scope of application of the Regulation translates itself into a significant restriction in the scope of application of the 'principle of linguistic equality' itself. The recent recognition by the Council[78] of the 'semi-official' status of Catalan,[79] Basque and Galician, in return for the assumption by Spain of the resulting costs, could set a precedent which, if followed, might gradually pave the way for the future use by the Community Institutions of other regional languages.[80]

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otherwise, e.g. to the Companies Act, Art. 2(7) of which specifically provides that, in case of conflict, the English language text prevails over the Maltese text. Some secondary legislation is adopted in English only such as, for instance, Central Bank of Malta directives or directives of the Maltese Financial Services Authority. Other legislation in technical areas, such as the Banking Act, the Central Bank of Malta Act or the Companies Act, drafted both in English and Maltese, contain no express provision on which version prevails in case of conflict.

[76] Under Art. 1 of Council Regulation (EC) No 930/2004 (O. J. L 169, 1. 5. 2004), the derogation does not apply to regulations adopted jointly by the European Parliament and the Council.

[77] Arts 1 and 2, ibid, the derogation is for a three year period and can be extended for a further one year period.

[78] See Press Release for the 2667th session (13 June 2005) of the European Council, General Affairs and External Relations.

[79] The particular situation of Catalan, which is spoken by more people than several official Community languages, had already prompted the adoption of the 'Resolution on languages in the Community and the situation of Catalan' (O. J. C 19, 28. 1. 1991. 42).

[80] See Press Release of the Committee of the Regions, 16 November 2005, available at http://europa.eu.int/languages/en/document/81, according to which the Committee of the Regions has recently entered into an agreement with the Spanish Ambassador to the EU approving, for the first time, the use of Spanish regional languages by a Community body.

III. The spelling of 'euro': a further legitimate qualification to the 'principle of linguistic equality'

Our enquiry into the Community language rules and our examination of the language regime of the Community Institutions has revealed the existence of multiple qualifications to multilingualism. The freedom that the Community Institutions enjoy to interpret and adapt the Community language rules in accordance with their distinct needs, the choice that Member States with more than one national official language have to decide which of these will enjoy the status of 'working' languages of the Union and the limited scope of the principle enshrined in the Treaty represent significant qualifications to the general application of multilingualism within the EU. In the same vein, the parallel existence of several language regimes, at different levels and for different purposes, suggests that it is only in connection with their external communication needs that the Community Institutions strictly adhere to multilingualism.[81] Measured against the background of the absence of a global language-related framework of rules and against the ECJ's acknowledgement that restrictions on linguistic equality can, in appropriate circumstances, be justified, provided that these are based on objective considerations, the abovementioned qualifications inevitably question the extent to which it is possible to speak of a 'linguistic equality principle', in the sense of a fully fledged, firmly entrenched and clearly established Community law principle. One is perhaps safer approaching the debate surrounding multilingualism as one which lends itself more to presumptions than to solid principles.

To the extent, however, that a 'principle of linguistic equality' *does* exist, it can plausibly be argued that the overriding nature of the common interest in the success of the EMU and the negative impact on the attainment of the

[81] Similar considerations also apply to the language regime of the EU agencies and bodies. Thus, while the Regulation establishing the The Office of Harmonistaion for the Internal Market [Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, O. J. L 11, 14. 1. 1994. 1.] expressly provides in Art. 115 for a specific, limited language regime applicable to the OHIM, the corresponding regulations in the case of other Community agencies, such as the Community Plant Variety Office, the European Agency for Safety and Health at Work, the European Centre for the Development of Vocational Training or the European Environment Agency and the European Environment Information and Observation Network, are either silent on the linguistic issue or expressly provide that the Community agencies to which they relate are subject to the language rules enshrined in the Regulation. The same is also true of some of the more recent Community agencies such as the European Network and Information Society, the European Centre for Disease Prevention and Control or the European Railway Agency.

EMU's objectives resulting from the parallel existence of variations in the name of euro, would suffice to justify reading a further qualification to the application of this principle with regard to the issue of the spelling of the name of the single currency.

It should first of all be remembered that the name of the single currency is an essential part of its definition: in a remarkably simple and straightforward manner, Council Regulation (EC) No 974/98 defines the single currency solely by reference to its name.[82] As the legal definition of the euro makes no reference to a benchmark against which to establish its exchange value, it follows that the name of the single currency is an indissoluble part of its legal identity that should not be interfered with, even if such name were to be deemed inconsistent with the language rules and traditions of some of the Member States.

Moreover, a multiplicity of spellings in the name of the single currency and the parallel existence of national variations of that name would inevitably subvert the application to the euro, a currency that 'exists simply as a result of a sovereign declaration',[83] of the principle of monetary nominalism, inherent in Arts 123 and 2 TEC and of Council Regulation (EC) No 1103/97 respectively[84] and, inevitably, generate uncertainty and confusion in terms of its status as legal tender across the territory of the EU as well as with regard to its singleness.

Perhaps the most decisive justification for opposing variations in the name of the single currency and for rebutting counter-arguments (including those drawn from the EU's respect for linguistic diversity), stems from the importance of the euro as a symbol of the EU.[85] Over and above its function as a means of payment, the single currency represents a tangible emblem of

[82] Art. 2 of the Regulation unequivocally provides that: 'As from 1 January 1999 the currency of the participating Member States shall be the euro. The currency unit shall be one euro. One euro shall be divided into one hundred cent'.

[83] Cabotte, J.-Ch.–Moulin, A.-M.: The Legal Status of the Single Currency. *Banque* de France Bulletin Digest, 107 (2002), 100. http://www.banque-france.fr/gb/eurosys/telechar/docs/eurcash3.pdf .

[84] The principle of monetary nominalism is crucial to the rationale for token money, i.e. money without any intrinsic value other than that assigned by the issuing bank. This argument is valid against calls for a differentiation in the spelling of the euro in banknotes and coins where the importance of preserving the highest degree of identity possible between individual examples of the single currency circulating within the EU, would be necessary to achieve fungibility.

[85] Significantly, the European Constitution included, in Art. I-8, the single currency and its name in its exhaustive enumeration of the 'The symbols of the Union'.

the common identity of the Member States and the visible embodiment of their shared commitment to the furtherance of European integration. While national currencies have certainly borne the burden of such symbolism over the centuries, each within the confines of their territory, it is possible to argue that the symbolic charge of the euro by far exceeds that of any other previous currency, since the euro stands not only for a commonly accepted medium of exchange and value but, ultimately, for a symbol of the political and economic communities from which it has sprang and for a portable reminder of a monetary union unprecedented in European history. Thus, if the euro is to fulfil its dual role as a palpable symbol of the Union's shared identity and as a potent integration tool central to the success of the common European project, language-motivated variations in its name should be avoided, not least where legally binding texts are concerned, even if this would mean reading a further qualification to the 'principle of linguistic equality'.

What the qualifications to the 'principle of linguistic equality' examined in this article have in common is the fact that they are underpinned by an objective justification. Such qualifications, particularly as reflected in the language regime of the Community Institutions, agencies or bodies, are almost invariably justified by reference to the need to strike a balance between the EU's respect for linguistic diversity and the inevitable constraints subject to which the Community Institutions operate. Moreover, as we have already seen earlier in this article, both the CFI and the ECJ have ruled that the provisions of the Treaty and of the Regulation that jointly spell out the language regime of the EU do not amount to absolute principles of Community law. Furthermore, both Courts have accepted that there will be circumstances where a restrictive language regime can be adopted by an Institution, provided that this is based on objective and proportional considerations that do not give rise to unwarranted differences of treatment and do not undermine the basic assumptions underlying multilingualism and the Community's commitment to its preservation. Applying *mutatis mutandis* the reasoning of the Community Courts to the particularities of the EMU, it is submitted that there is little to suggest that the public interest in the success of the EMU and the self-evident importance of the identity of the name of the single currency as a prerequisite for the achievement of the EMU's goals would not qualify as objective considerations of the highest order, justifying a further limitation to linguistic diversity with regard to the question of the spelling of the name of the single currency and legitimizing its uniform spelling, notwithstanding the apparent tension between the EMU's objectives and the language traditions and usages in some of the Member States.

IV. Conclusions

The EU's remarkable linguistic pluralism and its respect for linguistic diversity are core features of the Union, intimately related to its unique nature as a *sui generis*, treaty-based organisation consisting of 25 European countries with distinct, yet closely linked cultural and historical traditions. Despite the EU's promotion of multilingualism and the EU-wide consensus on the cultural and political importance of linguistic diversity, an examination of the Community language rules and of the policy of the Community Institutions in this field reveals that these are subject to several limitations and that multilingualism is not an absolute imperative but, instead, a value that should be balanced against other, equally important, albeit occasionally conflicting values.

The EMU is an area where the Community's policy of respect for multilingualism needs to be balanced against the imperatives of economic and monetary union. Therefore, to treat the question of the spelling of the name of the single currency as a linguistic question, in the context of which language driven considerations need necessarily be attributed a predominant status, would be to loose sight of the status of the actual principle of linguistic equality under Community law and to ignore the fact that, over and above its function as a means of payment, the single currency is also a symbol that must be constant and unchanged across the official Community languages, not least where its use in legally binding texts is concerned, if it is to fulfil its rallying role and integrating mission.

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TAMÁS NÓTÁRI*

On Bishop Virgil's Litigations in Bavaria

Abstract. Virgil, the bishop of Salzburg of Irish origin (749–784) opened a new chapter in the history of his episcopate: he had the earliest works of the historiography of Salzburg compiled: the Gesta sancti Hrodberti confessoris, the Libellus Virgilii and the Liber confraternitatum; he had the Rupert Cathedral constructed, which was consecrated in 774; he extended the rights of the episcopate and that of the Saint Peter Monastery and he organised the mission among the Carantanians. This paper deals with three aspects of the activity of Virgil, the abbot and bishop of Salzburg: the conflict between Bonifacius and Virgil (I.); the determination of the date of Virgil's ordaining (II.); and the debates for the goods and rights of the Saint Peter Monastery and the episcopate of Salzburg, which were noted down by Virgil in the Libellus Virgilii.(III.).

Keywords: Salzburg, Virgil, Bonifacius, Libellus Virgilii, Notitia Arnonis, Breves Notitiae

Virgil[1] arrived from Quierzy in Bavaria at the end of 745 or at the beginning of 746,[2] after spending two years at the court of the maior domus, Pippin III. It was on behalf of him that Virgil started his journey to the duke of Bavaria, Odilo; consequently,[3] Virgil must have arrived in Quierzy as early as the end of 743 or the beginning of 744 at the time of Odilo's Frank subjection.[4] Virgil

* Associate Professor, Reformed University „Károli Gáspár", Faculty of Law and Political Science, Department of Roman Law, H–1042 Budapest, Viola u 2–4.
E-mail: tamasnotari@yahoo.de

[1] Cf. Freund, S.: Von Tassilo zu Karl dem Großen. Die Salzburger (Erz-) Bischöfe und die Reichspolitik. In: v. Kolmer, L.–Rohr, Chr. (Hrsg.): *Tassilo III. von Bayern. Großmacht und Ohnmacht im 8. Jahrhundert.* Regensburg, 2005. 79; Dopsch, H.: Rupert, Virgil und die Salzburger Slawenmission. In: *1000 Jahre Ostarrîchi – Seine christliche Vorgeschichte. Mission und Glaube im Austausch zwischen Orient und Okzident.* Pro Oriente 19. Innsbruck–Wien, 1997. 103. sqq.; Nótári, T.: *Források Salzburg kora középkori történetéből.* (Sources of the early-medieval history of Salzburg.) Szeged, 2005. 24. sqq.; 81. sqq.; 137. sqq.; 153. sqq.; 96. sqq.

[2] Bonifatius, *epistolae* 68. *Monumenta Germaniae Historica* EE selectae. Berlin, 1916.

[3] Conversio Bagoariorum et Carantanorum 2. *Monumenta Germaniae Historica,* Hannover, 1997.

[4] Cf. Annales Mettenses priores a. 743. *Monumenta Germaniae Historica,* Hannover–Leipzig, 1905.

followed the Irish custom of the *peregrinatio pro amore Christi*,[5] he left his home with his companions including Dobdagrecus (Dubdá-Cích),[6] who was called *proprius episcopus* in the *Conversio Bagoariorum et Carantanorum*; just like his companion Sidonius, Virgil definitely began his work in Bavaria as an ordained clergyman.[7] Without going into a detailed discussion of Virgil's origin and activity in Ireland,[8] it is worth considering the question briefly which monastery Virgil and his companion came from. Shortly before his death, in the summer of 784, Virgil had the abbots of the monastery of Iona entered in the *Liber confraternitatum* so that the abbots in the Saint Peter Monastery in Salzburg should pray regularly for them afterwards. The list contains not only the abbots from Iona: in the first place is Saint Patrik, the apostle of Ireland; the ninth abbot of Iona, Adamnan, is followed by Keranus (Cíarán), the abbot of Clonmacnoise, and Columban, the abbot of Luxeuil-Bobbio. The list ends with Slébíne, the abbot of Iona, who died in 767.[9] If Iona is accepted as Virgil's homeland and it is supposed that he arrived on the Continent as an abbot, the question may arise which monastery was led by him

[5] Ó Néill, Pagraig P.: Bonifaz und Virgil: Konflikt zweier Kulturen. In: v. Dopsch, H.–Juffinger, R. (Hrsg.): *Virgil von Salzburg. Missionar und Gelehrter.* Salzburg, 1985. 80; Breatnach, P. A.: Über Beginn und Eigenart der irischen Mission auf dem Kontinent einschließlich der irischen Missionare in Bayern. In: *Virgil von Salzburg. Missionar und Gelehrter.* Salzburg, 1985. 85.

[6] *Conversio* 2.

[7] Bonifatius, *epistolae* 68; 212.

[8] About this see Ó Fiaich, T.: Virgils Werdegang in Irland und sein Weg auf dem Kontinent. In: *Virgil von Salzburg. Missionar und Gelehrter.* Salzburg, 1985. 17. sqq.; Moisl, H.: Das Kloster Iona und seine Verbindungen mit dem Kontinent im siebenten und achten Jahrhundert. In: *Virgil von Salzburg. Missionar und Gelehrter.* Salzburg, 1985. 27. sqq.

[9] *Liber confraternitatum* 20 Ca 2–c 2 Forstner, K. (ed.): Das Verbrüderungsbuch von St. Peter in Salzburg. Codices selecti 51. Graz, 1974); Wolfram, H.: Virgil als Abt und Bischof von Salzburg. In: *Virgil von Salzburg. Missionar und Gelehrter.* Salzburg, 1985. 342. sq.; Wolfram, H.: *Salzburg, Bayern, Österreich. Die Conversio Bagoariorum et Carantanorum und die Quellen ihrer Zeit.* München, 1995. 254; Löwe, H.: Salzburg als Zentrum literarischen Schaffens im 8. Jahrhundert. *Mitteilungen der Gesellschaft für Salzburger Landeskunde* 115 (1975) 100; Grosjean P.: Virgile de Salzboug en Irlande. *Analecta Bollandiana* 78 (1960) 92. sqq. About the *Liber confraternitatum* see Forstner, K.: Das Salzburger Skriptorium unter Virgil und das Verbrüderungsbuch von St. Peter. In: *Virgil von Salzburg. Missionar und Gelehrter.* Salzburg 1985. 135. sqq.; McKtterick, R.: Geschichte und Gedächtnis im frühmittelalterlichen Bayern. In: v. Niederkorn-Bruck, M.–Scharer, A. (Hrsg.): *Erzbischof Arn von Salzburg.* Wien–München, 2004. 70. sqq.; McKitterick, R.: Social memory, commemoration and the book. In: Ridyard, S. (ed.): *Reading and the Book in the Middle Ages.* Sewanee Medieval Studies 11 (2001) 5. sqq.; Fentress, J.–Wickham, C.: *Social memory.* Oxford, 1992.

in the meantime since he cannot be considered an abbot of Iona. Paul Grosjean takes side against the thesis that Virgil was Ferg(h)il, the abbot of Aghaboe (Achad Bo),[10] and this point is also supported by Herwig Wolfram, who does not preclude the possibility that Virgil might have had a connection with the monastery of Aghaboe, Trim, or Meath.[11] Apart from the general custom of peregrinatio, we are reduced to conjecture as to what personal motive for abandoning Iona Virgil might have had. It cannot be ruled out that the schism that influenced the spirit of the monastry of Iona for a long time might have influenced this decision since the *Liber confraternitatum* lists the names of the counterabbots of Iona too.[12]

I. The conflict between Bonifacius and Virgil crystallized around the current problems of Bavaria in the 740's; nevertheless, the differences in their views were rooted in their different origin, worldview and cultural background. Raising the aforesaid centres of Bavarian Christianity to episcopic rank that revived during the period of Duke Theodo and Emmeran (Haimhrammus), who worked in Regensburg, Rupert (Hrodbertus), who acted in Salzburg, and Corbinian (Corbirianus), who did service in Freising, would mean great progress also for the dukes of Bavaria which was not abundant in cities.[13] So Duke Theodo went to Rome in 715 or 716 in order to negotiate; consequently,[14] Pope Gregory II (715–731) commissioned bishop Martinianus and two of his assistants, Gregorius and Dorotheus to assign the exact borders of the three or four episcopates to be established in Bavaria in accordance with Duke Theodo's division of his dukedom among his sons, and to summon the nobles and the priests on these territories, among other things, in order to investigate the priests' faithfulness and lawful ordination.[15]

Pope Gregory II ordered that after taking three bishops' advice the new episcopates' bishops should be chosen, although the right of confirmation stayed

[10] Grosjean: *op. cit.* 97. sqq.; 100. sqq.

[11] Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 255.

[12] Grosjean: *op. cit.* 92. sqq.; Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 255.

[13] Reindel, K.: Das Zeitalter der Agilolfinger. In: v. Spindler, M. (Hrsg.): *Handbuch der bayerischen Geschichte I.* München, 1981^2. 196. sqq.

[14] *Liber pontificalis* 19. (Le liber pontificalis 1. Paris, 1886.); Paulus Diaconus: Historia Langobardorum 6, 44. (*Monumenta Germaniae Historica*, Hannover, 1878.)

[15] Kolmer, L.: Regensburg oder Salzburg? Die Christianisierung der Bayern und die Errichtung kanonischer Bistümer. In: v. Dopsch, H.–Kramml, P. F.–Weiß, A. S. (Hrsg.): *1200 Jahre Erzbistum Salzburg. Die älteste Metropole im deutschen Sprachraum.* Salzburg, 1999. 13.

within the authority of Rome.[16] In the most important episcopal center an archbishopric was to be founded, and the last decision about the archbishop's person–just as in the case of the bishops–was the priority of the Pope. If there was no proper person available, the Pope should be notified, and in this case he himself would send an archbishop to take the position.[17] Pope Gregory II's direction partly repeated the resolutions of Council of Braga in 583 and those of the Council of Lateran in 679, referring to the Anglo-Saxon ecclessiastical organization.[18] The Pope proceeded pursuant to his predecessors' routine in similar cases–as in the case of the English Church with its center in Canterbury–namely, he had reservations concerning the local clergy, and he was reluctant to decree the archbishop's ordination, ie. he wanted to build a system of dioceses that was under the direction of Rome.[19] This endeavour was in line with the goals of the Agilolfing dynasty inasmuch as they aimed at establishing an independent local Church that was free from the influence of the Church of the Frank Empire. Probably as far back as this early stage they intended to make Salzburg the center of the Bavarian Church[20] which eventually took place only in 798. It is not known why this episcopal organisation was not established soon after the Pope's resolution, the discords of the Agilolfing-dynasty and Karl Martell's politics to broaden his power might have played a part in the temporary failure of the plan.[21]

Pope Gregory II's missionary politics concerning German territories confined to entrusting Bonifacius on 15 May 719 with missionary work without naming any particular territory;[22] and after ordaining him bishop on 20 November 722 he sent Bonifacius to the countries and territories inhabited by Germans.[23] Later he read his reports and answered his questions.[24] Although dioces had no accurately defined borders, by the time of the rule of Pope Gregory III (731–741) the age of the travelling bishops had ended; their place was taken by

[16] Cf. Bonifatius, *epistolae* 28; Ó Néill: *op. cit.* 79.

[17] Reindel, K.: Die Organisation der Salzburger Kirche im Zeitalter des hl. Rupert. *Mitteilungen Gesellschaft für SalzburgerLandeskunde* 115 (1975) 96. sq.

[18] Bauerreiß, R.: *Kirchengeschichte Bayerns I.* St. Ottilien, 1958[2]. 58.

[19] Schmidinger, H.: Das Papsttum und die bayerische Kirche – Bonifatius als Gegenspieler Virgils. In: *Virgil von Salzburg. Missionar und Gelehrter.* Salzburg, 1985. 93.

[20] Reindel: *Das Zeitalter der Agilolfinger. op. cit.* 226.

[21] Schmidinger: *op. cit.* 93.

[22] Jaffé, Ph. *Regesta pontificum Romanorum.* Graz, 1956. 2157; Bonifatius, *epistolae* 12.

[23] Jaffé 2160; 2161; Bonifatius, *epistolae* 17; 18; 19; 21; 25.

[24] Bonifatius, *epistolae* 24; 26; Schieffer, Th.: *Winfried-Bonifatius und die christliche Grundlegung Europas.* Freiburg i. Br., 1980. 149. sqq.

bishops with constant residence.[25] A year after his accession to the throne, in 732, the Pope himself commissioned Bonifacius,who became an archbishop after the pallium was given to him, although he had not taken a diocese, to reorganise the Bavarian Church and to ordain bishops if necessary.[26] Bonifacius visited Bavaria as far back as 719,[27] and from 733 to 735 he visited all the Bavarian dioceses.[28] Pope Gregory III appointed Bonifacius legate and in his letters to the archbishops of Bavaria and Alemannia (Wiggo, Liudo, Rydolt, Phyphylo and Addo) he ordered them to assemble at a place determined by Bonifacius on the banks of the river Danube to consult.[29] Bonifacius named four dioceses: Regensburg, Passau, Salzburg and Freising.[30] These cities not only gained a significant role as secular centers, their sacred legitimation as far as Regensburg, Salzburg and Freising were concerned was ensured by the missionaries: Emmeran, Rupert and Corbinian.[31]

The bishops of these four dioceses were not recognised as Archbishops, although their episcopal rank was not questioned, but the place of the Archbishops were filled by new bishops ordained by Bonifacius: John in Passau, Erembert in Freising, and Gaubald/Gawibald in Regensburg.[32] In Passau, Vivilo was kept in his place despite reserves, which was confirmed by the Pope, though his confirmation was not without a tone of reprimand.[33] (Augsburg, which was founded far before the Bavarian Church, and Säben, which was included into the Bavarian dioceses later, are not mentioned; the Bishopric of Eichstätt including partly Bavarian, partly Swabian territories would be

[25] Wolfram, H.: Die Zeit der Agilolfinger. Rupert und Virgil. In: v. Dopsch, H. (Hrsg.): *Geschichte Salzburgs I.* Salzburg 1981. 136. sqq.

[26] Jaffé 2239; Bonifatius, *epistolae* 26; Schieffer: *op. cit.* 153. sqq.; Schmidinger: *op. cit.* 94.

[27] *Vita Bonifatii auctore Willibaldo* 5. *Monumenta Germaniae Historica.* Hannover–Leipzig, 1905.)

[28] *Ibid.* 6.

[29] Jaffé 2247; Bonifatius, *epistolae* 44; Löwe, H.: Bonifatius und die bayerisch–fränkische Spannung. Ein Beitrag zur Geschichte der Beziehungen zwischen dem Papsttum und den Karolingern. In: v. Bosl, K. (Hrsg.): *Zur Geschichte der Bayern.* Wege der Forschung 60. Darmstadt, 1965. 280. sq.

[30] Erkens, F.-R.: Summus princeps und dux quem rex ordinavit. Tassilo III. im Spannungsfeld von fürstlichem Selbstverständnis und königlichem Auftrag. In: v. Kolmer, L.–Rohr, Chr. (Hrsg.): *Tassilo III. von Bayern. Großmacht und Ohnmacht im 8. Jahrhundert.* Regensburg, 2005. 24.

[31] Schmidinger: *op. cit.* 94.

[32] *Vita Bonifatii* 7; Reindel: *Das Zeitalter der Agilolfinger. op. cit.* 229. sq.; Schieffer: *op. cit.* 180. sqq.; Kolmer: *op. cit.* 14; Erkens: *op. cit.* 25.

[33] Bonifatius, *epistolae* 45; Jaffé 2251.

founded only in 743/44.[34]) The oragnization of dioceses by Bonifacius was soon firmly established through promoting local traditions: Saint Emmeran's relics were placed with solemnity in Regensburg, Tasilo had Saint Valentine's relics taken to Passau in 764, Bishop Arbeo placed Saint Corbininan's earthly remnants in Freising in 765 and Virgil arranged for the veneration of Saint Rupert's and his companion's relics in the Cathedral of Salzburg.[35]

The question of establishing an Archbishopric was temporarily left unmentioned, the reason for this was probably that Bonifacius thought it was unnecessary to found a metropoly that joined the bishoprics, so he supervised the activity of the bishops as the Pope's legate and as a missionary archbishop.[36] Although he had reached the peak of his influence by this time, certain criticism was formulated against him, and with the deepening conflict between the Frank maior domus and the Agilolfings, Odilo and Bonifacius also estranged since the archbishop joined Karlmann openly.[37] Pope Zechariah (741–752) sent Sergius as legate to Bavaria, whom Odilo could consider Bonifacius's deputy, and it might have been to the Pope's interest to gain the Bavarian duke as an ally against the Langobards. The mission of Sergius ended unluckily: he appeared in the Franks' camp before the fight between Odilo and his brothers-in-law, Karlmann and Pippin, and warned them in the name of Saint Peter against war; after the duke's defeat he was imprisoned. After this incident, Zechariah renewed Bonifacius' rank as legate in Germany and in Gallia, yet Bonifacius' respect decreased to such an extent that even the Bavarian bishops ordained by him were reluctant to participate in the council convoked by him.[38] It was at the end of Bonifacius' career that one of his gravest conflicts occurred: his argument with Virgil.

Virgil and his follower, Sidonius, who worked in Bavaria after 745, were commissioned by Bonifacius to rechristen those Bavarians who received the sacrament of baptism from a local priest with the phrase *"in nomine patria et filia et spiritus sanctii"*.[39] Shortly before this, on 5 November 744 Pope Zechariah appointed Bonifacius legate of Germany and Gallia,[40] through that

[34] Reindel: *Das Zeitalter der Agilolfinger. op. cit.* 230. sqq.

[35] Schmidinger: *op. cit.* 95.

[36] Schieffer: *op. cit.* 184.

[37] Prinz, F.: *Frühes Mönchtum im Frankenreich. Kultur und Gesellschaft in Gallien, den Rheinlanden und Bayern am Beispiel der monastischen Entwicklung (4. bis 8. Jahrhundert).* München–Wien, 1965. 442. sq.

[38] Schmidinger: *op. cit.* 95; Kolmer: *op. cit.* 14.

[39] Bonifatius, *epistolae* 68.

[40] *Ibid.* 58; Kolmer: *op. cit.* 15.

he became a mediator between the papacy and the Frank Church.[41] Virgil and Sidonius refused to execute the order; they turned to Rome, and the Pope decided the argument in their favour; therefore, on 1 July 746 he informed Bonifacius that his order was incorrect, and announced that it was sufficient to cleanse those who were christened with the wrong phrase by the touch of his hand, and that christening in the name of the Holy Trinity is valid even if it is delivered by a heretic.[42] Pope Zechariah's reasoning seems to be plausible since Pope Gregory III had proposed a similar solution for the linguistic problems.[43] Nevertheless, if other orders sent to Bonifacius by Gregory II, Gregory III and Zechariah are taken into consideration, Bonifacius' uncertainty and rigour is understandable.[44] Bonifacius definitely knew the ecclesiastical standpoint about the delivery of sacrament by heretics; yet, in this case he set out from the idea that christening without naming the Holy Trinity was invalid, as it was confirmed by previous papal verdicts. The Bavarian priest delivered the sacrament in the name of *the homeland, the maid and the Holy Spirit*, which was justly disapproved by Bonifacius.[45] Virgil's and Sidonius' resistance might have revolted Bonifacius all the more since the Council known as *Concilium Germanicum*, which was held in 742, put the control of christening by priests under episcopal authority.[46] From his point of view, Virgil's procedure was not reprehensible either since according to Irish customs the delivery of the sacrement was the sovereign right of every priest, not even the bishops had the right to interfere. Furthermore, he understood that in the case of this priest who used this peculiar formula to christen it was not heresy or a mind yearning for teaching new doctrines what he had to face but simple ignorance.[47]

Bonifacius continued to argue by writing a new letter to the Pope, in which he accused Virgil of heresy concerning the doctrine of antipodoi; namely, that there were people living on the other side of the Earth, and they were illuminated by another Sun and another Moon.[48] The doctrine about the globular figure of the Earth was not in contrast with the opinion of ecclessiastical authorities, such as Augustinus, Isidorus Hispalensis and Beda Venerabilis; nevertheless, regarding the issue of antipodoi Augustinus and Beda Venerabilis refrained

[41] Löwe: *Bonifatius und die bayerisch-fränkische Spannung. op. cit.* 279.

[42] Bonifatius, *epistolae* 68; Schmidinger: *op. cit.* 96.

[43] Bonifatius, *epistolae* 45.

[44] *Ibid.* 12.

[45] Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 256.

[46] *Concilium Germanicum* (Ed. Rau, R. Quellen zur deutschen Geschichte des Mittelalters 4b. Darmstadt, 1968.) 2; Bonifatius, *epistolae* 56.

[47] Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 256.

[48] Bonifatius, *epistolae* 80.

from expressing an opinion, and Isidorus unambiguously claimed that it is a creature of imagination.[49] At the same time, the doctrine of antipodoi implied the questioning of the unity of mankind and by that the universality of redemption.[50] Bonifacius, as a pragmatic and organising mind,[51] had little interest in investigations and speculations about natural sience, so in Virgil's accusation his antipathy against the Irish abbot most probably played an important part.[52] Being aware of these accusations, in his letter written on 1 May 748 Pope Zechariah no longer supported Virgil and Sidonius so unconditionally as he had done before, and the fact that he distanced himself also from Sidonius unambiguously shows that his opinion was changed not only by Bonifacius' accusations against Sidonius regarding his cosmological misconseptions. Zechariah summoned Virgil and Sidonius to Rome, and sent a letter to Duke Odilo, who had died in the meantime, in order to secure that Virgil would really set off, and he distanced himself from the claim that he had promised him the bishopric of Salzburg. Instead, he questioned Virgil's clerical authority and ordered that Bonifacius, who was nevertheless encouraged to be conciliatory and gentle, should bring Virgil and the Irish priests concerned to the Council, and if they were guilty of heresy, they should be expelled from the Church.[53] The further consequences of the case are not known; Virgil did not set off to Rome, and no schism occured either; Virgil was possibly given the vacant seat of the bishopric of Salzburg with papal consent, presumably evading the legate Bonifacius. Pippin III's permission for acquiring the diocese of Salzburg, which was necessary both de facto and de iure after the Bavarian defeat in 743, was available.[54] The papal licentia was obtained presumably

[49] Cf. Löwe, H.: *Ein literarischer Widersacher des Bonifatius, Virgil von Salzburg und die Kosmographie des Aethicus Ister.* Akademie der Wissenschaften und Literatur in Mainz. Abhandlungen der geistes- und sozialwissenschaftlichen Klasse 11 (1951) 939. sqq. (Otto Prinz refuses the authorship of Virgil-Prinz, O.: *Die Kosmographie des Aethicus. Monumenta Germaniae Historica,* Quellen zur Geistesgeschichte des Mittelalters 14. München, 1993. 1–84.)

[50] Wolfram: *Die Zeit der Agilolfinger. op. cit.* 143.

[51] Löwe: *Ein literarischer Widersacher des Bonifatius. op. cit.* 963. sqq.; Ó Néill: *Bonifaz und Virgil. op. cit.* 77.

[52] Schmidinger: *op. cit.* 97.

[53] *Ibid.*

[54] Beyerle, K. (ed.): *Lex Baiuvariorum* 1, 10. München, 1926.) Cf. Jahn, J.: *Ducatus Baiuvariorum. Das bairische Herzortum der Agilolfinger.* Monographien zur Geschichte des Mittelalters 35. Stuttgart, 1991. 186. sqq.

by Odilo,[55] which makes it evident that the bavarian Duke and Virgil could cooperate well, even against Bonifacius.[56] (Heinz Löwe brought Cosmographia, the work attributed to Aethicus Ister, most probably correctly, into connection with the accusation of the doctrine of antipodoi, claiming that Virgil wanted to take sarcastic revenge with this opus written under this pen name after 764 on his former rival, Bonifacius, who died a martyr in 754.[57])

II. The second chapter of *Conversio Bagoariorum et Carantanorum* first lists the superiors (bishops and abbots) of the church after Rupert's death, or, departure from Salzburg,[58] and starts to expound Virgil's origin and his activity in Bavaria. The order of the abbots and bishops in this chapter of the *Conversio* is the following: Bishop Rupert, Bishop Vitalis, abbot Anzogolus, abbot Savolus, bishop Flobargisus, bishop John and bishop Virgil. The order given in the *Liber confraternitatum*[59] and in a verse in *De ordine conprovincialium pontificum* are different.[60] Whereas in the *Liber confraternitatum* bishop and abbot Vitalis takes the second place after abbot Anzogolus, according to the *Conversio* Rupert himself appointed Vitalis to be his successor. The aforesaid verse might be responsible for the inverted order of Anzogolus and Vitalis, since this

[55] Bonifatius, *epistolae* 80; *Breves Notitiae* 8, 5. *Postea vero, cum Virgilius peregrinus donante Otilone duce suscepit regimen ipsius Iuvavensis sedis et episcopatum...*

[56] Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 257; Freund, S.: *Von den Agilolfingern zu den Karolingern. Bayerns Bischöfe zwischen Kirchenorganisation, Reichsintention und karolingischer Reform (700–847).* Schriften zur bayerischen Landesgeschichte 144. München, 2004. 89. sqq.; Freund: *Von Tassilo zu Karl dem Großen. op. cit.* 69.

[57] Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 257.

[58] *Conversio* 2. *[Sequitur dehinc catalogus episcoporum sive abbatum eiusdem Iuvavensis sedis, quam ewangelicus doctor Roudbertus ab anno adventus eius de Wormatia in Bawariam u. sque in die vocationis suae rexit. Anno nativitatis Domini DCXCIII.] Igitur post excessum beatissimi Roudberti pontificis vir carus omni populo egregiu. sque doctor et seminator verbi Dei Vitalis episcopus sedem Iuvavensem regendam suscepit. Post cuius transitum Anzogolus extitit abbas. Post cuius depositionem predicte sedi adhesit Savolus abbas. Cuius vite finito cursu Ezius abbas successit. Quo migrante de saeculo iterato illa sedes honorata refulsit episcopo Flobargiso. Post quem Iohannes pastoralem gessit in sede praefata curam.*

[59] *Liber confraternitatum* 14 Aa 1. sqq. *Hrodperthus epsicopus et abbas, Anzogolus abbas, Vitalis episcopus et abbas, Savolus abbas, Izzio abbas, Flobrigis episcopus et abbas, Iohannis episcopus et abbas, Virgilius episcopus et abbas.*

[60] *De ordine conprovincialium pontificum* (Ed. Dümmler, E. *Monumenta Germaniae Historica* Poetae Latini 2. Berlin, 1884.) 1, 1a–b *Hrodbertus episcopus, Vitalis episcopus, Flobargisus episcopus, Iohannes episcopus, Virgilius episcopus*

source lists only those of Rupert's successors who received the episcopal rank. Nevertheless, it is a fact that little is known about the men listed after Rupert and before Virgil, sometimes nothing is known except for their names.[61] The first who was ordained for the episcopy of Salzburg, which became a bishopric in 739, was bishop and abbot John, who was appointed by Bonifacius, and who is known as the person who received the donations of the nobility. Several sources refer to John's friars long after his death.[62] Bishop John departed this life on 10 June 746, or as it seems more probable in 747 on the same day.[63]

In the years after his arrival in Salzburg, Virgil occupied the office of an abbot since, as it is claimed in the *Conversio*, he postponed his ordination to bishop for about two years, and the work was accomplished by Dobdagrecus, who accompanied him to Bavaria.[64] Virgil's ordination took place in all probability on 15 June 749,[65] though according to the *Conversio* he was willing to have himself ordained only on 15 June 767, at the constant entreaty of the people and the bishops. Although the day of the ordination was not questionable, its year was a controversial issue for a long time since the two dates mentioned in the *Conversio*, i.e., Virgil's arrival in Bavaria in 745/746 and the period of two years' waiting before his alleged ordination in 767 could not be harmonised. When answering this question, four points must be taken into consideration: Virgil's place in the order of the Bavarian bishops; the foundation of Otting, which took place in the year of Virgil's ordination, and which was dated by Pippin and Odilo jointly, though without reference to the year.[66] The statement in the second chapter of the *Conversio* which claims that Virgil took over the direction of the church of Salzburg in 746/47 and he was willing to have himself ordained only two years later "populis petentibus et

[61] Hermann, K. F.: *Geschichte der Erzabtei St. Peter zu Salzburg I.* Salzburg, 1996. 58. sqq.; Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 252.

[62] *Breves Notitiae* 8, 13. *monachi sancti Rudberti atque Iohannis*; Willibaldus, *Vita Bonifatii* 7.

[63] Bonifatius, *epistolae* 68; 80; 212.

[64] *Conversio* 2.

[65] Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 258.

[66] *Breves Notitiae* 13, 1. sqq. (Ed. Lošek, F.: Notitia Arnonis und Breves Notitiae. Die Salzburger Güterverzeichnisse um 800. *Mitteilungen Gesellschaft für Salzburger Landeskunde* 130 (1990) 100. sqq.; Lošek, F.: Notitia Arnonis und Breves Notitiae. In: *Quellen zur Salzburger Frühgeschichte.* Veröffentlichungen des Instituts für Österreichische Geschichtsforschung 44; *Mitteilungen Gesellschaft für Salzburger Landeskunde* Ergänzungsband 22. Wien–München, 2006.

episcopis regionis illius";[67] and finally that Virgil's name occurs as *abba(s)* in the documents of the archives.[68]

The minutes of the Council of Dingolfing in 776/77,[69] which contain the agreement about the community of prayer implemented by the Bavarian bishops and abbots, was signed by the following people: Manno, the bishop of Neuburg; Alim, the bishop of Säben; Virgil, the bishop of Salzburg; Wisurich, the bishop of Passau; Sindbert, the bishop of Regensburg; and Arbeo, the bishop of Freising.[70] The order of the signatures was determined by the time spent in office, the date of ordination, as determined by the pseudoisidorian collection based on the Western Gothic *Ordo de celebrando concilio.*[71] Therefore, if the people signing the minutes of the Council of Dingolfing followed this order, it seems to be impossible that Virgil was ordained bishop only in the year 767 since Arbeo was presumably ordained in 764, and he is explicitly mentioned as bishop in a text dating from 17 May 765 in the *Traditio Frisingensis.*[72] Herwig Wolfram argued for 755 as the year of the ordination as far back as 1971 referring among other things to this fact;[73] yet, this has not become a generally accepted standpoint in the literature.[74] (Obviously, the order of the signatures might lead to incorrect conclusions, especially when the signatures of those absent were added to the minutes later.[75]) Nevertheless, in this case those who signed the document were most probably present at its compilation.[76] The fact that the *Notitia de pacto fraternitatis* in Dingolfing contains the names of the signatory bishops in the order of their ordination is

[67] *Conversio* 2; cf. Hellmann, M.: Der Begriff „populus" in der Conversio Bagoariorum et Carantanorum. In: v. Hellmann, M.–Olesch, R.–Stasiewski, B.–Zagiba, F. (Hrsg.): *Cyrillo-Methodiana. Zur Frühgeschichte des Christentums bei den Slaven 863–1963.* Graz, 1964. 161. sq.

[68] Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 258.

[69] Freund: *Von Tassilo zu Karl dem Großen. op. cit.* 71.

[70] *Notitia de pacto fraternitatis episcoporum et abbatum Bawaricorum, Monumenta Germaniae Historica* Conc. 2, 1/1. Hannover–Leipzig, 1906.); cf. Jahn: *Ducatus Baiuvariorum. op. cit.* 512. sqq.

[71] Fichtenau, H.: Die Reihung von Zeugen und Konsentienten. In: *Beiträge zur Mediävistik 3.* Stuttgart, 1986. 176.

[72] *Traditio Frisingensis* Nr. 23. (Ed. Bitterauf, Th. Quellen und Erörterungen zur bayerischen Geschichte. Neue Folge 4–5. München, 1905–1909.) Cf. Jahn: *Ducatus Baiuvariorum. op. cit.* 376. sq.

[73] Wolfram, H.: Der Zeitpunkt der Bischoftweihe Virgils von Salzburg. *Mitteilungen des Instituts für Österreichische Geschichte* 79 (1971) 297. sqq.

[74] Löwe: *Salzburg als Zentrum literarischen Schaffens im 8. Jahrhundert. op. cit.* 111. sq.

[75] Fichtenau: *op. cit.* 176.

[76] Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 259.

supported by other sources. A letter of donation from 770 contains two lists of the witnesses, in the first one Tasilo III is placed first followed by bishop Alim and Arbeo.

The second list begins with Virgil, and Wisurih is placed second.[77] Another document from Freising dated 16 November 777 deals with a donation implemented with the approval of the duke and the nobility in the presence of Bishop Virgil. Arbeo, the bishop of Freising, and Odalhart, the bishop of Neuburg, who replaced Manno two months before, are indicated as witnesses.[78] The founder of Kremsmünster refers to three bishops present: Virgil, Sindbert, the bishop of Regensburg, and Waltrich, the bishop of Passau.[79] Whereas the *Notitia de pacto fraternitatis* put Wisurich before Sindbert, the founder of Kremsmünster, it placed Wisurich's successor, Waltrih, after Sindbert. Although there are sources from the first half of the year 777 implying that Wisurich was still alive, it can be concluded that at the time of the foundation of Kremsmünster Waltrich had not been in office for a long time.[80] Following Herwig Wolfram, from the aforesaid facts it can be inferred that Wisurich, the bishop of Passau, to whom reference is made only between 770 and 777, was certainly ordained before Arbeo, and the same stands also for Sindbert, the bishop of Regensburg. Therefore; Virgil's ordination must have taken place before 764/65; consequntly, 767, the year indicated in the *Conversio* is incorrect.[81]

The *Breves Notitiae* states Otting was founded in the year Virgil was ordained bishop, and emphasises that the ceremony took place during the reign of Pippin and his nephew, duke Tasilo.[82] Double dating (royal and ducal) can be found in other sources from Freising from 754/55 and 760/62.[83] After Grifo (Hiltrud's stepbrother), who temporarily seized power, was driven out from Bavaria with Pippin's help, the eight-year-old Tasilo was appointed Duke of Bavaria by Pippin.[84] Over Tasilo guardianship was exercised by his mother,

[77] *Traditio Frisingensis* Nr. 39.

[78] *Ibid.* Nr. 86.

[79] Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 377.

[80] *Ibid.* 259.

[81] *Ibid.* 260.

[82] *Breves Notitiae* 13, 1–2. *De cella aput Ottingen. Cellam, que dicitur Ottinga, temporibus domni Pippini regis et Thassilonis ducis nepotis Guntherius quidam comes in pago Chiemingen in propria hereditate sua construxit et ecclesiam pro amore dei et anime sue salute ad sevicium dei et sanctorum eius. Convocavitque illuc Virgilium episcopum eodem anno, quo ad episcopum ordinabatur ...*

[83] *Traditio Frisingensis* Nr. 7–9b.

[84] *Annales regni Francorum a.* 748 (Ed. Kurze, F. *Monumenta Germaniae Historica* SS rer. Germ. in susm scholarum 6. Hannover, 1895.); *Annales qui dicuntur Einhardi a.*

Hiltrud until her death in 754, and through her, indirectly by his uncle, Pippin between 754 and 757.[85] It was in the imperial assembly in 757 in Compiégne that Pippin freed Tasilo from his guardianship; nevertheless, the sources of official Frank historiography do not disclose this fact.[86] Referring to Bitterauf's edition, Herwig Wolfram calls the attention to a piece of the *Traditio Frisingensis,*[87] and after investigating the textual tradition draws the conclusion that it was possible to use double dating also after 757; yet, after 763 no instance of this is found. Consequently, it can be stated that the investigated paragraph about the year of Virgil's ordination in the *Breves Notitiae* can by no means refer to the events in 767.[88] This interpretation is corroborated by the fact that the *Breves Notitiae* calls Tasilo Pippin's *nepos*, emphasising his dependence. Moreover, according to the narrative Count Gunther asks King Pippin's permission for the donation with the consent and on the advice of Tasilo.[89]

From these facts it becomes evident that the foundation of Otting–and Virgil's ordination in the same year–took place probably in the period when

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748 (Ed. Kurze, F. *Monumenta Germaniae Historica* SS rer. Germ. in usum scholarum 6. Hannover, 1895.); *Annales Mettenses priores a.* 749

[85] Wolfram, H.: Das Fürstentum Tassilos III., Herzogs der Bayern. *Mitteilungen Gesellschaft für Salzburger Landeskunde* 108 (1968) 160. sqq.; About Tasilo see Classen, P.: Bayern und die politischen Mächte im Zeitalter Karls des Großen und Tassilos III. In: *Ausgewählte Aufsätze.* Vorträge und Forschungen 28. Sigmaringen, 1983. 235. sqq.; Krawinkel, H.: *Untersuchungen zum fränkischen Benefizialrecht.* Forschungen zum deutschen Recht II/2. Weimar, 1937. 47. sqq.; Becher, M.: *Eid und Herrschaft. Untersuchungen zum Herrescherethos Karls des Großen.* Vorträge und Forschungen, Sigmaringen, 1993; Becher, M.: Zwischen Macht und Recht. Der Sturz Tassilos III. von Bayern 788. In: *Tassilo III. von Bayern. Großmacht und Ohnmacht im 8. Jahrhundert.* Regensburg, 2005. 39. sqq.; Erler, A.: Herzog Tassilo vor dem Königsgericht in Ingelheim. In: *Beiträge zur Ingelheimer Geschichte* 27, 1978. 27. sqq.; Schieffer, R.: Ein politischer Prozeß des 8. Jahrhunderts im Vexierspiel der Quellen. In: *Das Frankfurter Konzil von 794. Kristallisationspunkt karolingischer Kultur I. Politik und Kirche.* Quellen und Abhandlungen zur mittelrheinischen Kirchengeschichte 80. Mainz, 1997. 167. sqq.; Airlie, S.: Narratives of triumph and rituals of submission: Charlemagne's mastering of Bavaria. In: *Transactions of the Royal Historical Society,* 1999. 93. sqq.

[86] See Klebel, E.: Bayern und der fränkische Adel im 8. und 9. Jahrhundert. In: *Grundfragen der alemannischen Geschichte.* Mainvorträge 1952. Vorträge und Forschungen 1. 1955. 193. sqq.; Kienast, W.: *Die fränkische Vasallität. Von den Hausmeiern bis zu Ludwig dem Kinde und Karl dem Einfältigen.* Frankfurt am Main, 1990. 80. sqq.

[87] *Traditio Frisingensis* Nr. 22.

[88] Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 261.

[89] *Breves Notitiae* 13, 10. *Postea vero una cum consilio et consensu Thassilonis ducis peciit domnum Pippinum regem...*

Pippin was directly or indirectly Tasilo's guardian; that is, between 748/49 and 757. It can be righteously assumed that the period, *of two years* according to the *Conversio*, which passed between Virgil's arrival in Bavaria (745/46) and his ordination might have been *one year longer* since the 15th of June in 749 was Sunday, which was an ideal day for the ordination. The fact that Virgil was ordained bishop in the period when the Frank ruler produced great influence on the Bavarian Dukedom unequivocally chimes in with the good personal relationship between Pippin and Virgil.[90]

Virgil is referred to as abba(s) in two sources that give an account of events between 747 and 748: (i) the description of the argument of the cella sancti Maximiliani in the Notitia Arnonis, which involved Duke Odilo who died on 18 January 748; consequently, the date of the conflict can be defined in 747;[91] and (ii) a piece in the Tradito Frisingensis about a donation, which was begun by Odilo and ended by Tasilo after his father's death.[92] Based on these arguments it can be assumed that the period of waiting and delaying mentioned in the Conversio can be counted from 747; and that Virgil having acted as an abbot until that time, who adherred to both the Irish and the Rupertian tradition that attributed great significance to cloistered life, was ordained bishop of Salzburg on 15 June 749. It was after that he took over the bishop's office from Dobdagrecus, who most probably possessed a bishop's rank of only a general nature, but had not been appointed de iure to direct the Bishopric of Salzburg.[93]

III. Virgil had taken a firm stand to defend the rights of the Saint Peter monastery already as an abbot. The Irish *regula* also demanded this from an abbot who was responsible for the monastery. Nevertheless, Virgil wanted to enforce the requirements of the continental (Frank) system, which was in

[90] Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 262. Cf. Haider, S.: Zur Baugeschichte des Salzburger Virgil-Domes. *Mitteilungen des Österreichischen Instituts für Geschichte* 80 (1972) 35. sqq.

[91] *Notitia Arnonis* 8, 7. (Ed.: Lošek, F.: Notitia Arnonis und Breves Notitiae. Die Salzburger Güterverzeichnisse um 800. *Mitteilungen Gesellschaft für Salzburger Landeskunde* 130, 1990; Lošek, F.: Notitia Arnonis und Breves Notitiae. In: *Quellen zur Salzburger Frühgeschichte.* Veröffentlichungen des Instituts für Österreichische Geschichtsforschung 44; *Mitteilungen Gesellschaft für Salzburger Landeskunde* Ergänzungsband 22. (Hrsg.: v. Wolfram, H.) Wien–München, 2006. *Cepit autem Virgilius abba hanc ipsam causam querere ad Otilonem ducem...*

[92] *Traditio Frisingensis* Nr. 3.

[93] Wolfram: *Salzburg, Bayern, Österreich. op. cit.* 262.

contradiction with the Irish tradition in several points.[94] Although he had a good personal relationship with Duke Odilo, after taking over the direction of Salzburg, he began an argument concerning the *cella sancti Maximiliani* in Bischofshofen, i.e. for the goods of the Saint Maximilian friars' house. The *cella sancti Maximiliani* in Pongau was founded by Saint Rupert with the consent of Duke Theodo and with the cooperation of the brothers Tonazanus and Urso, but it was soon destroyed by the invading Slavs.[95] According to the first part of the *Libellus Virgilii* that is in the *Breves Notitiae*[96] the place on which the friar's house was built had been found by Tonazan, Rupert's servant, and by Ledi, the Duke's servant.[97] After arriving home from the Franks from his exile in 741, Odilo gave the fortune of Saint Maximilian to his faithful assistant minister Ursus/Urso, who followed him to exile, in order to rebuild the friars'house, which was derelict for a long time. (Probably it was not only Ursus who had a position of trust around the Duke, but also his predecessors, the members of the *genealogia Albina* had had a closer relationship with dukes Theodo and Theodbert before.[98])

The relation of the *Notitia Arnonis* about this event is less perspicuous and logical. After the establishment of the monastery, Tonazanus and Urso sent their successors, Vurmhari and Cissimo (the *Libellus Virgilii* mentions Tonazan's and Ledi's successors, Wernharius and Dulcissimus[99]) to the Saint Peter monastery in Salzburg in order to study. After growing up, they asked Rupert to permit them to dispose over half of the estate that was donated to the monastery by their predecessors as a life interest. Rupert permitted this, however; he stipulated that the other half of the estate belonged to the Saint Peter monastery. Later on Vurmhami and Cissimo secured for their successors the life interest of the estate that was owned by them; yet, the subordination to Salzburg continued until the time of the rule of Odilo.[100] Urso, Odilo's assistant minister asked for the whole of the estate as *beneficium*, and Odilo fulfilled this request and he seized the estate from the monastery of Salzburg by force. Abbot Virgil demanded that the estate should be returned by the Duke, who wanted to offer his estate in Laufen as replacement, but the abbot

[94] *Ibid.* 263. sq.
[95] *Notitia Arnonis* 8, 1–4; *Breves Notitiae* 3, 15; 8, 2. Cf. Dopsch: *op. cit.* 100. sq.
[96] *Breves Notitiae* 3, 1–16.
[97] *Ibid.* 3, 1. sqq.
[98] Jahn: *Ducatus Baiuvariorum. op. cit.* 204.
[99] *Breves Notitiae* 3, 1.
[100] *Notitia Arnonis* 8, 5–6.

did not accept this. So Odilo kept the estate that was seized from the monastery unrightfully for himself.[101]

Virgil does not mention the re-establishment of the *cella* in the second chapter of *Libellus Virgilii* which is the core of the *Breves Notitiae*, and which deals with Pongau and the *cella sancti Maximiliani*.[102] He confines himself to relate that Odilo gave the *cella Maximiliani* and its estates as *beneficium* to his assistant minister, Ursus.[103] This event took place before Virgil's arrival in Bavaria, without episcopal approval. The lack of the episcopal approval is presumably a sign of Odilo's effort to restrict the episcopal influence on donations related to ducal rights, and to enlarge his sphere of power by the donation of estates to monasteries and to churches.[104] Virgil took definite steps to separate the ecclessiastical/episcopal and the secular/ducal benefices and the rights connected to them, in spite of his good relationship and cooperation with Odilo. Virgil gives a picture about the conflict with Ursus which is biassed and not without contradiction.[105] Ursus, the assistant minister of the Duke was a member of the *genealogia Albia*, the members of which were dedicated to God and Saint Maximilian by Duke Theodbert, when Rupert consecrated a church at the same place, Pongau.[106] Moreover, he emphasised that Duke Theodbert donated the *cella Maximiliani* to Rupert and to his episcopal residence.[107] It cannot be ascertained, whether it was Virgil himself who mentioned the residence in connection with Rupert, who did not find and did not establish a

[101] *Ibid.* 8, 6–7. *Tunc quoque Urso cappellanus Otilonis petiit, ut ei ipsas res ex integro daret in beneficium, et ita Otilo fecit et tulit per vim de monasterio Salzpurch. Cepit autem Virgilius abba hanc ipsam causam querere ad Otilonem ducem, et Otilo voluit illud comparare cum eo, quod habuit ad Laufom, et hoc Virgilius nullatenus consensit, et ita Otilo permansit retinendo iniuste, quod de Salzburch monastero subtraxit.*

[102] *Breves Notitiae* 8, 1–15.

[103] *Ibid.* 8, 4. *Deditque Otilo dux, ut hic predictum est, Urso presbitero suo hoc ipsum ad Albinam et ipsam cellam in beneficium.*

[104] Jahn: *Ducatus Baiuvariorum. op. cit.* 205; Jahn, J.: Tradere ad Sanctum. Politische und gesellschaftliche Aspekte der Traditionspraxis im agilolfingischen Bayern. In: *Gesellschaftsgeschichte* 1, 1988. 400. sqq.

[105] Cf. Wanderwitz, H.: Der Libellus Virgilii und das Verhältnis von Herzog und Bischöfen in Bayern. In: *Virgil von Salzburg. Missionar und Gelehrter.* Salzburg, 1985. 358. sq.

[106] *Breves Notitiae* 8, 1. *In peregrinatione Otilonis fuit cum eo quidam presbiter capellanus eius Ursus nomine, qui de illa genealogia erat supradictorum hominum de Albina, quos Theodbertus dux tradidit deo et sancto Maximiliano ad Pongo, quondam domnus Rudbertus episcopus illam ibi ecclesiam dedicavit.*

[107] *Breves Notitiae* 8, 2. ... *quod Theodbertus dux, ut predictum est, dedit sancto Maximiliano et domno Rudberto episcopo ad sedem suam.*

residence in Salzburg, or it is a result and interpolation of the editorial work on the *Breves Notitiae*.[108] In order to find an excuse for Duke Odilo, Virgil later adds that Odilo did not know that the church in Pongau was built and consecrated by Rupert with the donations of Theodo and Theodbert and the friars' house and the people living there were donated to the bishopric of Salzburg by Duke Theodbert.[109] Odilo might have been soon informed about the legal situation; despite this, he refused to gratify Virgil's demand that he should return the *cella Maximiliani* that he had formerly given to Ursus. According to the *Breves Notitiae*, Odilo's reason for this was that he did not want to disappoint his assistant minister.[110] After this, Virgil tried to obtain the half of the estate found by Rupert and the duke's servants, Tonazan and Ledi for the church. (The other servant's name in the *Notitia Arnonis* was the same as that of the assistant minister, Ursus/Urso.)[111]

Virgil's struggle was not against Duke Odilo, he wanted to oppose the Bavarian custom according to which the ecclessiastical properties that were established by the donations of the duke and the nobility were returned to the successors of the establishing family, or, as in the case of Pongau, to the 'discovering' family, as feudal tenure.[112] It was indirecly due to the reforms of Bonifacius, who was Virgil's great enemy, that Virgil could take firm steps in order to defend the rights of the bishopric and the Saint Peter monastery, since only after Bonifacius' reform did it become possible to strictly separate ducal and episcopal monasteries and churches in Bavaria. In the case of the friars' house in Pongau, we cannot talk about *ab ovo* ducal or episcopal establishment, since the bishopric of Salzburg had not existed at the time of the establishment of the *cella Maximiliani*, and Bavaria did not have a bishop

[108] Dopsch: *op. cit.* 99; Jahn: *Ducatus Baiuvariorum. op. cit.* 207[354].

[109] *Breves Notitiae* 8, 3. *Et Otilo dux nescius erat, qualiter domnus Rudbertus eundem locum ad Pongo primo cepit construere et ecclesiam ibi edificavit et consecravit concedentibus ducibus Theodone et Theodberto filio eius. Sed et hoc nescivit, quod Theodbertus dux ipsos homines ibidem tradidit et ipsam cellam cum omni traditione suo confirmavit sancto Rudberto episcopo ad sedem Iuvavensem episcopatus sui.*

[110] *Breves Notitiae* 8, 5–6. *Postea vero, cum Virgilius peregrinus donante Otilone duce suscepit regimen ipsius Iuvavensis sedis et episcopatum, cognita ista supradicta causa venit ad Otilonem ducem et dixit ei omnem hanc causam ab initio per ordinem rogavitque eum secundum iustum iudicium hoc reddere sancto Petro ad ipsam sedem. Sed Otilo noluit eundem Ursum presbiterum suum contristare neque tollere ei illud beneficium ...*

[111] *Breves Notitiae* 8, 6. *... tunc autem cepit Virgilius episcopus medietatem inde querere propter illum servum sancti Rudberti Tonazanum nomine, qui hoc ipsum primo cum Latino vicino suo invenit.*

[112] Jahn: *Ducatus Baiuvariorum. op. cit.* 208. sq.

who was ordained according to the canon. Odilo urged the establishment of monasteries under ducal authority and he entrusted non-Bavarian bishops with the consecration in order to defend his rights and in order to exclude the bishops' arising claim to authority.[113] Since Virgil was reluctant to accept the estate in Laufen that was offered as replacement for the estate in Pongau, Odilo had to give half of the demanded estate to Virgil, where the bishop consecrated a church in order to represent the legal claim.[114] At the same time, Ursus built a church in Oberhalm with the help of the Duke, and this was consecrated by a roaming bishop, Liuti, who did not have jurisdiction. Nevertheless, Virgil placed the church which he called *'discord'(Discordia)* under *excommunicatio* and banned his priests from service there.[115] The *Libellus Virgilii*–and by this also the *Breves Notitiae*–disclose only that this situation was unaltered until Bishop Virgil was alive.[116] It is worth mentioning that Virgil's procedure and standpoint in the argument about the legal authority over the *cella Maximiliani* was much closer to Bonifacius' ideology that represented continental views than to the Irish customs, widespread in Virgil's homeland, which left the right of disposal over monasteries in the hand of the establishing clans.[117]

Virgil defended the rights of the bishopric with the same resolution in the conflict related in the third part of the *Libellus Virgilii*[118] that developed around the friars' house established by Count Gunther in Otting. In the year of Virgil's ordination a *cella* and a church were established in Otting on his estate in the district of Chiemgau. He asked the bishop to come in order to reveal his intention to summon there friars and to appoint an abbot to lead them and to give a part of his estate to provide for them.[119] Virgil asked under whose jurisdiction the abbot and the friars would belong and whose *dominium* it would be. Count Gunther refused to answer, so Virgil refused to consecrate the church, the monastery and to ordain the abbot until he did not receive information about the status of the monastery under the canon law.[120] Therefore; the Count considered the case and promised that the monastery would be established pursuant to the regulations in the canon law and he would place the monastery,

[113] *Ibid.* 210.
[114] *Breves Notitiae* 8, 7–9.
[115] *Ibid.* 8, 10–11.
[116] *Ibid.* 8, 11. *Et ita excommunicata permansit, quo u. sque Virgilius episcopus vixit.*
[117] Wolfram: Virgil *als Abt und Bischof von Salzburg. op. cit.* 334; Ó Néill: *op. cit.* 78.
[118] *Breves Notitiae* 13, 1–7.
[119] *Ibid.* 13, 1–2.
[120] *Ibid.* 13, 3.

the church and their fortune under the authority of the bishopric of Salzburg if Virgil was willing to consecrate the church, which was accepted by Virgil and he consecrated the whole place and the *basilica* to Saint Stephen.[121] Consequently, the Count gave the church and all its possessions to the bishop by handing over the altarcloth *(per pallium altaris)* in order for him to govern it in accordance with the regulations of the canon *(ad regendum secundum canones)* like the other churches in the diocese.[122]

According to the report of the *Libellus Virgilii*, the bishop received the jurisdiction over the monastery and church of Otting, ie. the argument ended more succesfully than the confrontation with Odilo's assistant minister, Ursus, a few years before. Nevertheless, the question may arise whether this report corresponds to the facts.[123] Many decades later, at the time of the writing and edition of the *Breves Notitiae* the author of the passage inserted a sentence at the end of the chapter, which recounted that there was yet another a negotiation and a legal procedure between Arn and Wenilo concerning the church of Otting, in the presence of Richolf and Gerold, the ministers of Charlemagne.[124] According to this, the jurisdiction over the church remained contested and the final decision was reached only after Tasilo's dethronement in 788.[125] The litigants included Arn, the bishop of Salzburg and Wenilo, a member of the clan of Gunther, who were the legal successors.[126] The *Notitia Arnonis* also mentions the arguments concerning Otting, and based on this account it can be rightly assumed that these possessions were illegally seized from ecclessiastical authority under the rule of the Agilolfings, and only the court constituted by the ministers *(missi)* of Charlemagne returned them to the bishopric of Salzburg.[127] With regard to the establishment by Gunther the only thing the *Notitia Arnonis* refers to is the permission of the duke; therefore, the

[121] *Ibid.* 13, 4–5.

[122] *Ibid.* 13, 6–7.

[123] Jahn: *Ducatus Baiuvariorum. op. cit.* 289.

[124] *Breves Notitiae* 13, 13. *Rursus placitum est habitum de ipsa ecclesia Arnonis et Wenilonis coram Richolfo et Geroldo legatis domni Karoli regis.*

[125] Wanderwitz: *op. cit.* 359.

[126] Jahn, J.: Virgil, Arbeo und Cozroh. Verfassungsgeschichtliche Beobachtungen an bairischen Quellen des 8. und 9. Jahrhunderts. *Mitteilungen Gesellschaft für Salzburger Landeskunde* 130 (1990) 201. sqq.; Jahn: *Ducatus Baiuvariorum. op. cit.* 290.

[127] *Notitia Arnonis* 6, 24–25. *Cella, que vocatur z'Ottinga, quam construxit Guntharius comis in iure hereditario in pago Chimingaoe in honore sancti Stephani protimartiris, et quod ei Tassilo dux concessit in beneficio ... Ipsam vero cellam iniuste abstractam domnus rex pro mercedis sue augmentum* (sic!) *iterum revocandam ab. sque ulla contradictione concessit.*

count might have assigned Otting to the monastery of Saint Peter; however, nothing is said of the role of the bishop and the importance of the regulations in the canon law. This practice, namely, that the ducal *licentia/permissio* was sufficient to establish an *Eigenkirche/kloster* was fully in compliance with the Bavarian custom of the time.[128] Virgil tried to document the truth of his standpoint in the minutes in the *Libellus Virgilii* in the case of the *cella Maximiliani* in Pongau and also in the case of Otting; nevertheless, his efforts to assert the ecclessiastical/episcopal legal claim–as it turns out from the collation of the different sources–was unsuccesful. Virgil based the rights of the church and the friars' house in Pongau on the consecration by Rupert without referring to the regulations in the canon law. On the other hand, he demanded in the case of Otting that Count Gunther should renounce his rights regarding the church before and a prerequisite for the consecration, and based his arguments on the canon, thus reasoning for the legality of the ecclessiastical authority in two different ways.[129]

Pope Gelasius I (492–496) had already made efforts to limit the rights of the secular establishers: according to his decree the bishop could only consecrate a church if Rome had given a permission and the establishers had to give up their rights before the consecration. They had to deposit the funds to supply the established church in custody, and as early as the 4th and 5th centuries they had to accept the legal authority of the bishop over self-established churches, their possessions and the priests serving there.[130] These directives could not be completely effective, especially on the territories where the ruling (royal or ducal) power was based on the ecclessiastical benefices. The regulations of the canon could be enforced somewhat imperfectly in Bavaria before the arrival of Bonifacius: the duke could dispose over the ecclessiastical institutions established by him arbitrarily, and the authority over the church was an important constituant of ruling power.[131] The Langobard tradition was similar to the Bavarian, the establishers of the churches and cloisters retained the legal authority over the institutions established by them thus supporting the financial safety of their successors who chose ecclessiastical career. This was ensured by making a contract on returning the authority, which paved the way for the development of the so called priest clans. It was Charlemagne who put an end to this situation that was contrary to the canon law both in Bavarian and

[128] Jahn: *Ducatus Baiuvariorum. op. cit.* 290.

[129] *Ibid.* 291.

[130] Ewig, E.: *Die Merowinger und das Frankenreich.* Stuttgart–Berlin–Köln–Mainz, 1988. 111. sq.

[131] Jahn: *Ducatus Baiuvariorum. op. cit.* 292.

Langobard territories; nevertheless, the bishoprics established by Bonifacius and his ecclessiastical reform in Bavaria gave the opportunity to Virgil to enforce the authority that was due to him pursuant to the canonical decrees, though his effort was not always successful as it can be seen in the case of Pongau and Otting. At the same time, Bonifacius did not define the borders of the dioceses; therefore, it was the bishops themselves who had to put an end to the *Eigenkirche* and *Eigenkloster* system that was under the authority of the secular establishers and integrate the benefices into their own bishopric.[132]

A process similar to that in Bavaria had taken place on Frank territories years before, after the Council of Chalcedon, and the Councils of Orléans and Arles in 511 granted extensive authority to bishops,[133] vesting them with the right to appoint and dismiss the abbots of the cloister in their dioceses, to consecrate churches, altars and to ordain priests and to determine and observe the rules of life in the cloisters, which allowed them to supervise the benefices of the cloister. The establisher and his family could not retain or receive the authority over the church or cloister established by him, only the institutions established by the king were exempted to a certain extent; they could pursue their own management and administration.[134] Although cloisters were established in the first half of the 7th century in the Frank Empire; i.e., the Notre Dame cloister in Luxeuil, Rebais and Soissons, where the establishers could keep their authority and the cloister could freely dispose over the donations, these privileges were based on the bishop renouncing the rights which belonged to him *de iure canonico*. The Carolings made successful efforts to gain authority over more cloisters since they regarded them a strong support of their power. The Bavarian dukes followed only the practice of the Frank maiores domus, who possessed royal prerogatives. The legal state of the Irish cloisters augmented this tendency since the cloisters organised the Irish way could choose the bishop who was asked for the consecration, and in certain cases the bishop himself, who fulfilled the abbot's function at the same time, tried to organise an independent diocese for the cloister.[135]

In the Bavarian tradition it was necessary to have the ruler's permission to establish a cloister, which involved ducal defence, and the dukes disposed over the cloisters that were established by them or with their contribution, ie. the cloisters were entirely integrated into the Bavarian feudal system. Bonifacius's reform tried to end this practice by the restoration and creation of the episcopal

[132] *Ibid.* 293.
[133] Ewig: *op. cit.* 110. sqq.; 134. sqq.
[134] Jahn: *Ducatus Baiuvariorum. op. cit.* 294.
[135] *Ibid.* 295. sq.

authority, and this effort gave rise to an unresolvable conflict between the duke and the nobility and the bishops. Nevertheless, there is no point in supposing a serious political conflict between the bishop and the duke, as it was not true in the case of Odilo and Virgil either. Bonifacius's reform did not end the *Eigenkirche* system of the nobility since the wider circle of the clan was excluded from the inheritance and the right of disposal by the *traditio* given to the bishopric, which subsequently returned the church as a *beneficium* to a certain member of the family which gave the donation. This was recorded in a conclusive deed valid in court. What they did was place the *Eigenkirche* system under episcopal authority and influence the order of inheritance with the help of the regulations of the canon law. It depended on the power of the establishers and donators how long this situation subsisted. In most cases–to fulfil the essence of the *traditio*–the bishopric was given the church in question with all its possessions.[136]

The cases related in the Libellus Virgilii and the consequences drawn from them make several tendencies clear which occured during the reign of the two last members of the Agilolfing dynasty. It cannot be considered accidental that the Bavarian bishoprics were held together under the archbishopric of Salzburg only after Charlemagne's takeover in 798, since the establishment of the archbishopric would have considerably infringed the rights of the dukes and impaired the possibility to interfere with the abbots' and bishops' decisions. It would have deprived the dukes of their rights to chair the councils.[137]

Virgil's activity in Bavaria, his argument with Bonifacius and his struggle for the possessions of the Saint Peter monastery and the bishopric of Salzburg is peculiar; it does not lack contradictions in certain points which, after all, tend towards synthesis in their relationship with each other. Virgil could fight for the enforcement of the canon law only by building on the basis that was laid by his great enemy, Bonifacius, by following the tradition that was Frank in mentality rather than Irish, and while doing so he created the first spiritual golden age of Salzburg.

[136] *Ibid.* 299. sq.
[137] Wanderwitz: *op. cit.* 360; Kolmer: *op. cit.* 15; Erkens: *op. cit.* 23.

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PETER SMUK*

Law Pertaining to Political Parties and Political Pluralism – Freedom of the Foundation and Functioning of Political Parties in Post-Communist Hungary

Abstract. This paper studies the law pertaining to political parties in Hungary, from the viewpoint of establishing and maintaining of political pluralism. In the period of 1989–1990, the transition from the one-party system to the democratic and pluralistic state of law could be followed up relative to the development of the law pertaining to the political parties, which is based on the rules that foreclose the contingent development of unconstitutional political system.

The paper reviews the concept of the political party according to the constitutional law, the normative framework of functioning and the regulations of the internal organization of political parties. The provisions of primary importance concern: a) equality of political parties, b) forbidden purposes and instruments, c) rules of incompatibility, d) state subvention. Rules concerning the internal organization require the openness and the prevailing of democratic will-making also inside the political parties, so contribute to the maintaining the democratic competition of political parties.

The author emphasizes the factors that determine multiparty-system, and argues that electoral thresholds and the effective method of state-financing of political parties contest the principle of equality and harm the fair-competition. Thresholds and subvention are both based on the effectiveness of political parties–though being capable to prevent the party system and the parliament from fragmentation, nonetheless, they prefer extensively, if not unconstitutionally, the political parties in the Parliament, so they can be seen as being designed to protect the current political elite.

Keywords: political parties, party law, political pluralism, state subvention of political parties, electoral systems/electoral law

Constitutionality, established by provisions affirming and demarcating rights as well as by rules safeguarding these rights as institutional guarantees of the prevailing social-political system provided under Constitutions, is principally a requirement to be observed by governments primarily as a sequel to the grievous experiences of history. The bewildering precedent of the Weimar Republic is only one regrettable instance to admonish posterity that no political establishment can dispense with the rules that foreclose the contingent development of

* Associate professor, Széchenyi István University, Győr
E-mail: smuk@.sze.hu.

unconstitutional political systems.[1] Nonetheless, according to András Sajó's view, effective Constitutions are not designated to safeguard future societies. Since Constitutions are mere corollaries of ("creations related to") the fears generated by previous political systems, they set forth the modus operandi of the exercise of political power.[2]

In view of the post-transformation constitutional processes in Central-Eastern-Europe, it is particularly valid to assert that Post-Communist political systems, by reason of disquieting historical experiences, intended to institute multifarious constitutional safeguards, so as to protect the pluralism of political parties. Therefore, the respective provisions can be construed with respect to the former exclusive role of the Communist Party. In this paper, we'll briefly expound the rules of the Constitution and other law governing political parties in Hungary framed with the purpose of legally substantiating and sustaining pluralist democracy and the underlying multi-party system.

As a matter of course, countries in the former Soviet-bloc had had to comply with the Stalinist "constitutional" pattern, therefore, they had implicitly declared the autocracy of the communist party (e.g., Hungary in 1972 set forth, "The Marxist–Leninist Party of the working class shall be the leading force of society.", Poland in 1952 stipulated, "The Polish United Workers' Party shall be the leading political force of the society designated to build socialism."). Nevertheless, memories of the multi-party system prevailing in Hungary before the communist-socialist era had not faded by the time of the change of regime, when Parliament annulled the provisions substantiating the exclusive power of the Socialist Workers' Party under the Constitution. Nonetheless, as Halmai concurrently noted, law pertaining to political parties as a sub-division of the law of associations cannot *per se* ground the democratic functioning of the multi-party system, because these regulations have a limited scope of effect.[3] Consequently, the observance of the effective legal environment established during the 18 years following the political transformation would be an in-

[1] *See*, Para. 59 of Decision of 1995 of the European Court of Human Rights on *Vogt v. Germany*: "The Court proceeds on the basis that a democratic State is entitled to require that civil servants are loyal to constitutional principles, on which the State is founded. In this respect, the Court takes into account the calamities Germany had suffered under the Weimar Republic and during the woeful period that followed the collapse of that regime up to the adoption of the Basic Law in 1949. Since Germany intended to avert the contingent recurrence of those experiences, it founded the new State on the concept of a 'democracy capable of self-sustenance'."

[2] Sajó, A.: *Az önkorlátozó hatalom* (The Self-Limiting Power). Budapest, 1995, 18.

[3] Halmai, G.: *Az egyesülés szabadsága* (Freedom of Association). Budapest, 1990. 161. For the discussion of law governing the one-party system, *see*, 135–139.

dispensable condition of the democratic functioning of the multi-party-system even in our days.

1. Freedom of the Foundation of Political Parties

1.1. The Definition of Political Parties and Their Functions

The freedom of the foundation of political parties is derived from the concept of the freedom of association, since political parties are construed as special associations to be governed by specific rules as to their purposes and functions. The specificities of law pertaining to political parties, which derive from their specific constitutional relevance established in 20th century, are adequately intelligible on the basis of the conceptual position of the pertinent rules. Scilicet, the freedom of the foundation of organisations is conceived as a civil right within the scope of the fundamental freedom of association under Art. 63 and the political freedom of the foundation and functioning of political parties is stipulated under Art. 3 of the Constitution of Hungary. Such reversed positioning of the pertinent regulation has been frequently criticised for its inconsistency,[4] nevertheless, it can be justified on grounds of the prominent role of political parties as 'intermediaries' between the State and the individual, as instruments to effectuate the will of the citizens between elections.[5]

Political parties are not regulated under all constitutions, since the framers of constitutions tend to exclude that area.[6] Nevertheless, the Constitution of Hungary specifies rules pertaining to political parties as follows: "Political parties [...] may be freely formed and may freely function, provided that they respect the Constitution and other law established in accordance with the Constitution" (Para. 1 of Art. 3), "political parties shall participate in the formation and declaration of the common will of the People" (Para. 2 of Art. 3), "political parties may not directly exercise public authority, therefore, they may not control State organs..." (Para. 3 of Art. 3). Whereas, it does not

[4] On the pertinent provision of the Constitution of Poland of 1997, *see*, Chmaj, M.: Freedom of the Foundation and Functioning of Political Parties in Poland. *Polish Political Science*, 2001. 103.

[5] Halmai, G.: *Kommunikációs jogok* (Rights Related to Communication). Budapest, 2002. 237. Quote from 206 BVerfGE 20, 56 (101).

[6] Sólyom, L.: *Pártok és érdekszervezetek az alkotmányban* (Parties and Interest Organizations as Regulated under the Constitution). Budapest, 2004. 27. As Sólyom established, "the history of Hungarian codification cautions that *omnis definitio periculosa est.*"

circumscribe the concept of political parties, nor does other pertinent law, such as Act 2 of 1989 on Associations or Act 33 of 1989 on the Functioning and Finances of Political Parties (hereinafter: Act on Political Parties), therefore, it shall be construed on the basis of the specified functions. The latter statutes specify further conceptual elements of functioning, e.g., nomination of candidates for elections, democratic functioning, publicness of finances, exercise of public authority by representatives, reservation of membership for natural entities. Accordingly, political parties are civil organisations with extra functions (which, according to the current Head of State of Hungary, is a "staggering concept of political parties"). Although, the freedom of the foundation of political parties is construed as a form of the fundamental civil right of association, it may be limited by law pursuant to constitutional authorisation, so as to demarcate the manners and the scope of interference by the State and public authorities.[7]

1.2. Normative Framework of Functioning

a) Equality

The right of the foundation of political parties construed as associations shall be unrestricted as a condition of the equality and fair competition of political parties: the entry of new entities in the competition can be guaranteed in this manner.[8] Furthermore, during campaigns, since the neutrality of public authorities is prescribed, each political party will have equal chances to become a governing party or a party in opposition.[9] Equal opportunity is meant to be guaranteed by way of equal legal remedies or by the delegation of representatives to electoral committees pursuant to law governing elections, such as Act on Election Procedures,[10] pursuant to Art. 3 of which, the equal chances of candidates are stipulated, whereas, Art. 106 provides that local public media shall at least once, free of charge broadcast political advertisements of nominating organizations and of candidates for mayorship in proportion to the nomination or electoral lists, from day 15 preceding voting to day 3 before voting. All independent candidates are entitled to exercise this right jointly, in proportion to their nomination. On the final day of the election campaign, national organs of media shall broadcast a round-up on eight nominating organisations that have put forward most candidates for representatives and mayorship on the

[7] Halmai: *Freedom of Association. op. cit.*, 147.
[8] Sólyom: *op. cit.* 64–65.
[9] Halmai: *Rights Related to Communication. op. cit.*, 238.
[10] Act 100 of 1997 on Election Procedures.

basis of a nation-wide aggregation. Joint candidates and lists shall be taken into consideration according to their rate of nomination.

Therefore, the provisions of the Constitution and other law underwrite political pluralism, since they treat political parties on an equal basis.[11] Equality, however, is fundamentally contested by the effective method of financing political parties by the State (see below).

b) Purposes and Instruments

The scope of objectives of political parties specified under deeds of foundation shall be supervised both upon registration and during functioning, as well. The most severe specified sanctions are the denial of registration and dissolution as a safeguarding measure, which independent jurisdiction is authorised to apply.[12] (N.B., The admissibility of dissolution by reason of risks known from history was a matter of debate in Germany and established with a view to hindering the reorganisation of totalitarian parties.)[13] Nevertheless, according to the assertion of the current Head of State of Hungary (appointed to manifest the unity of the nation and to protect the democratic functioning of state organisation pursuant to the Constitution), "The dissolution of a political party is always *a political decision*. The judgement whether or why a party is deemed dangerous *in re* democracy is always dependent on *the actual political situation*, because *it is a preventive measure*."[14] Whereas, the European Court of Human Rights, which has been in several cases designated to decide on the substantive restrictions of the purposes of political parties, has consistently argued that the danger of the curtailment of democracy shall be an acceptable justification for limitations, especially for those the institution of which is necessitated by historical experience.

In 1998, in its Decision on *Socialist Party and others v. Turkey,* ECHR held that „one of the principal characteristics of democracy is that it creates opportunities for resolving the problems of a country through dialogue, without recourse to violence, even if those problems are irksome. Scilicet, a basic prerequisite of democracy is guaranteeing the freedom of expression, on grounds of which, no justification obtains for the elimination of a political group solely by reason of its endeavour to initiate and effectuate public debate on the situation of specific segments of the population and their involvement in public life, in order to seek democratic solutions to the mutual satisfaction of all

[11] *Cf.*, Chmaj: *op. cit.* 110.

[12] Under Point d) of Para. 1 of Art. 3 of Act on Political Parties.

[13] Halmai: *Freedom of Association. op. cit.* 143–144.

[14] Sólyom: *op. cit.* 94.

parties concerned."[15] Concerning the appeal of another Turkish party, the Court argued that it derives from the core concept of democracy that diverse political programs may be put forward and debated, even those that contest the actual organisation of a State, provided that the respective programs shall not violate democracy.[16]

Nonetheless, according to the argumentation of the current Head of State of Hungary, the special protection of the freedom of the foundation of political parties as a civil right of party founders is recognised as constitutional on grounds of the function of political parties as mediators between the State and the People, i.e., of the relatedness of its content to the fundamental rights of communication. Substantive restrictions can be admitted exclusively with regard to this relation. Therefore, as opposed to the indication of the objective of the political party (which may be reduced to the phrase: performance of the constitutionally specified duties of political parties), the specification of political purposes under the deed of foundation of the political party cannot be made mandatory (may not be required) under Hungarian law, furthermore, neither the submission, nor the existence of a political program shall be specified as requirements for the registration of a political party.[17] With respect to fundamental freedoms of communication and law pertaining to political parties, the provisions that guarantee the freedom of mass communication need to be highlighted, since the freedom of the media (as the main battleground of the competition of parties) is a universally recognised prerequisite of political pluralism safeguarded by the prohibition of censorship.[18]

Nevertheless, various institutional guarantees *de facto* obtain to delimit the scope of purposes and instruments. Accordingly, the Preamble of the Constitution stipulates that the Republic of Hungary is a state founded on the rule of law, which effectuates a multi-party system and parliamentary democracy, which, as an imperative, is further substantiated pursuant to Para. 1 of Art. 3 with a limiting clause. A safeguarding provision pursuant to Para. 3 of Art. 2 stipulates that no entity may attempt the forcible acquisition, exercise or the exclusive possession of public authority, consequently, every citizen has the right and obligation to take action against such attempts in all manners permitted by law. Furthermore, Para. 3 of Art. 3 precludes that political parties

[15] Para. 45 of Decision of 1998 on *Socialist Party and others v. Turkey.*

[16] Para. 41 of Decision of 1999 on *Freedom and Democracy Party (ÖZDEP) v. Turkey.*

[17] Sólyom: *op. cit.* 65–66. and 76–77.

[18] *Cf.*, Garlicki, L.: Principles of the System of Government in the Republic of Poland. In: Sarnecki, P.–Szmyt, A.–Witkowski, Z. (*eds.*): *Principles of Basic Institutions of the System of Government in Poland.* Warszaw, 1999. 61–62.

exercise public authority directly. Accordingly, no single party may exercise exclusive control of a Government organ. Pertinent statutes prohibit the foundation of party organs in workplaces and provide that the exercise of the right of association may not involve criminal offences or a call for criminal offences and may not violate others' rights and freedoms. Furthermore, on grounds of the exercise of the right of association, no military organisation may be established.[19]

c) Rules of Incompatibility

Under the provisions of the Constitution, party membership shall be incompatible with the fulfilment of specific public offices, because the functioning of personae fulfilling these offices shall be attached to the requirement of impartiality, therefore, incompatible with the promotion of political causes. Consequently, the fulfilment of the offices of the Justices of the Constitutional Court and of the Head of State of the Republic of Hungary, of the Judiciary and the Persecution is incompatible with party membership.[20] The prohibition of party membership as to the official personae fulfilling offices of the armed forces, of the police is stipulated under Para. 4 of Art. 40/B. In its pertinent Decision on *Rekvényi v. Hungary,* ECHR held that the freedom of association of the applicant, i.e., the General Secretary of the Independent Trade Union of the Police, was not violated under Para. 2 of Art. 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms prohibiting party membership of persons fulfilling offices of the armed forces, the police and certain offices of state administration. According to the argument, "in view of the background of Hungary's recent history and the sustenance of a politically committed police force, which used to support a totalitarian regime

[19] For a comparison, *see*, Art. 13 of the Constitution of Poland of 1997: The functioning of political parties and other organizations, the programs of which bear the marks of totalitarianism, Nazism, fascism or communism, as well as those whose programs or activities instigate racial or national hatred, admit recourse to force for the purpose of the obtainment of political power or of influencing State policy or secrete their organisation or members shall be prohibited. In Poland, pursuant to Arts 6–7 of Act of 1997 on Political Parties, it is also stipulated that political parties shall not implement or take over the implementation of duties of public authorities specified as such by law and may not organize or establish political party organs at workplaces.

[20] *Cf.*, Para. 1 of Art. 30, Para. 5 of Art. 32/A, Para. 3 of Art. 50, Para. 2 of Art. 53 of the Constitution, *cf.*, Para. 3 of Art. 178, Para. 3 of Art. 195 of the Constitution of Poland.

for decades, the Court considered the efforts to depoliticise the police by no means arbitrary."[21]

d) State Subvention of Political Parties

Whereas, it is stipulated under the Constitution that the State shall not interfere with the competition of political parties, the majority of European states are actively involved in financing parties from the state budget. Such an arrangement has been established basically on the following grounds: on the one hand, with a view to the curtailment of the influence of private interest-groups, on the other hand, the more professional functioning of political parties as organs operating in the public sector should be facilitated by financial support.[22] Nevertheless, party-financing raises the moot questions concerning the position of the State and the equality of political parties. As a matter of course, the revenues of political parties always affect their respective positions in the competition, furthermore, revenues are indispensable for persistence. Therefore, the State has a crucial role as to the maintenance of the competitiveness of political parties, consequently, it may also violate the principle of equal opportunity. Evidently, for the purpose of counterbalancing such defaults, formal and normative criteria as to the scale of state subvention will have to be stipulated, which preclude the consideration of the programs and ideologies of political parties.[23] This way, although, we may have reservations concerning the differences in financing parliamentary or non-parliamentary political parties, the current system of state subvention does undeniably sustain both the smaller political parties *in opposition* and the multi-party system. The current Head of State of Hungary raised the question, whether the State may be obligated to subsidise political parties, if they cannot perform their constitutionally stipulated duties without state support.[24] In view of the fact that the plurality of political parties (at least of two parties) is a prerequisite of the functioning of the current political and constitutional system, the answer needs to be affirmative. Therefore, the duties of the State encompass not only the recognition of political pluralism, but its promotion, as well, which implies the sustenance/organi-

[21] *See*, Para. 57 of Decision of 1999 on *Rekvényi v. Hungary*. For commentaries on this decision, *see*, *Fundamentum*, 3 (1999) No. 3.

[22] Enyedi, Zs.–Körösényi, A.: *Pártok és pártrendszerek* (Political Parties and Party Systems). Budapest, 2004. 137.

[23] Sólyom: *op. cit.* 120.

[24] Sólyom: *op. cit.* 123.

sation of political pluralism and securing compensation in the scope of affirmative action for parties holding disadvantageous positions in opposition.[25]

The effectual normative framework of public financing of political parties is provided under Act on Political Parties, according to which, the results of the previous election shall determine the admissibility of publicising the finances of a political party and the scale of public funding. The obtainment of 1 p.c. of the votes in national elections is stipulated for political parties as the lowest limit for entitlement to public funds. According to the German pattern,[26] Act on Political Parties further provides that the proportion of public finances may not exceed 50 p.c. of all revenues of political parties. This regulation, however, could not be upheld, in recent years, state funding has equalled the proportions of 80–0 p.c. of all revenues of parliamentary parties.[27]

Within the purview of Act of 1990 on Remuneration, Cost Reimbursement and Other Benefits of Members of Parliament, the fractions of parliamentary parties are entitled to receive different amounts of funding according to their positions (in Government or opposition), such as a monthly amount equivalent to the basic remuneration of twenty-five Members of Parliament, furthermore, 30 p.c. of the basic remuneration of each member of the party/parties in government and 60 p.c. of the basic remuneration of each member of the parties in opposition shall be granted for the coverage of expenses of operation from the budget of the Office of Parliament.[28] Independent Members of Parliament shall be granted 75 p.c. of their basic remuneration in support of their work. The payment of a lower rate of remuneration for parties in Government can be explained by their privileged positions in state administration and infrastructure, whereas, the opposition in Parliament has been compensated by the specification of such a distinction.

2. Regulation of the Internal Organisation of Political Parties as Associations

In the followings, we'll provide a brief conspectus of the rather laconic regulation of the internal organisation of political parties under Hungarian law. As Halmai

[25] On grounds of the territorial lists of political parties. *Cf.*, Para. 2 of Art. 5 of Act on Political Parties.

[26] *See*, Halmai: *Rights Related to Communication. op. cit.* 243–244.

[27] Source: Financial reports of parties published on their websites.

[28] Before 01. 01. 2003, the respective rates had been 25 p.c. and 50 p.c., thus, the difference has increased.

noted in 1990, in countries that had been subjected to totalitarian regimes, Constitutions stipulate explicit rules pertaining to internal democracy. These rules and the conforming regulation under Hungarian law governing political parties are designated to prevent the deformation of political life by giving way to totalitarianism.[29]

2.1. The Constitution of Hungary does not require explicitly that political parties and other social organisations have a democratic structure or function according to democratic principles. Whereas, Act 2 of 1989 on Associations does require that democratic functioning on the basis of the principle of self-governance is stipulated under deeds of foundation, that clause would need to be substantiated by the Constitution, since the stipulation of that requirement qualifies as a restriction of the constitutionally guaranteed fundamental right of association. Nevertheless, as the pertinent argument of the current Head of State of Hungary generally applicable to constitutional democracies demonstrates, the requirement of democratic functioning can be inferred from the Constitution: "If the Constitution establishes a democratic State, political parties, having a constitutive role in it, cannot function according to departing principles. The internal democratic structure of political parties derives from their constitutional functioning. If the duty of a political party is *the mediation the common will of the People towards the State, it will be organisationally apt* to manifest the political will of the People within the political party, which may shape the program and policy of the political party. Nevertheless, it is primarily *the role of political parties in shaping the will of the State* that requires democratic will-formation within political parties. [...] The State will be democratic, so far as mediation on the part of political parties guarantees that the People exercise sovereignty."[30]

To evade further ambiguity, we'll attempt to render a definition of democratic functioning. Hungarian statutes don't provide many guidelines. The Polish Constitutional Court, on the basis of the concept of political parties circumscribed under the Constitution, held that a political party should establish its internal organisation (membership and structure) on the democratic principles of equality and voluntary access. As Chmaj argued, "For the purpose of avoiding non-conformity of its purposes to the Constitution, a political party shall in its deed of foundation or other legal document define the purpose of its

[29] Halmai: *Freedom of Association. op. cit.* 147. *Cf.*, Para. 1 of Art. 21 of the Constitution of Germany, Para. 2 of Art. 10 of the Constitution of Portugal, Art. 6 of the Constitution of Spain and Art. 49 of the Constitution of Italy.

[30] *See*, Sólyom: *op. cit.* 55–56.

foundation in relation to the scope of State policy and the purpose *per se* as well as the instruments specified for its realisation shall be democratic. [...] The phrase of 'democratic methods' refers not only to the 'external' scope of activities of a party, but also to its 'internal' activity."[31] Russian law governing political parties provides a concise list of binding democratic criteria, which includes: the insurance of openness of structure, formation of party organs via elections and majority decisions made by members.[32]

2.2. Democratic Principles (that should govern the main aspects of the internal organisation of a political party are as follows):[33]

a) Openness

The finances of political parties are recognised as the most delicate aspect of public functioning. Therefore, Art. 9 of Act on Political Parties stipulates a warranting rule, according to which, financial reports of parties shall be publicised in the press or the Hungarian Official Gazette.

Membership in political parties is a further precarious element of openness, since the fundamental right of privacy encompasses the confidentiality of political commitment.

In its pertinent Decision, the Constitutional Court ruled that democratic political parties, which may not exercise public authority directly under Para. 3 of Art. 3 of the Constitution, may claim the protection of their documents or files similarly to other legal entities on grounds of the privacy of personal data under the provisions of the Constitution and other law. Although, pursuant to Act on Association and Act on Political Parties, the exercise of the freedom of association is attached to publicity in specific areas, such as finances and deeds

[31] Chmaj: *op. cit.* 105.

[32] *Cf.*, Art. 8 of Act 95-FZ of 2001: The activities of political parties shall conform to the elements of voluntary membership, equality, self-governance, legality and openness. Political parties shall be free to determine their internal structure, objectives, forms and methods of their activities in compliance with pertinent Federal Law. Accordingly, the operation of political parties shall be public, consequently, information on their constituency and program shall be accessible for the general public. The formation of oligarchies shall be prevented by guaranteeing equal opportunity for the citizens of the Russian Federation (for men and women without distinction) as members of political parties for participation in the Supreme Bodies of political parties, for candidature for the positions of representatives and various offices in the organs of state administration as well as in bodies of local self-governments.

[33] *Cf.*, Decision of 1952 of the German Constitutional Court (BVerfGE 2,1 ff.). Quoted in: *Halmai: Freedom of Association. op. cit.* 143.

of foundation, otherwise, functioning shall be attached merely to self-governance and the observance of democratic principles. Scilicet, the stipulation of public access to information of public interest under Art. 61 of the Constitution is a constitutional guarantee designated to promote the control of authorities that exercise public authority.[34]

b) Freedom of Establishing and Terminating Membership

Restrictions of membership in political parties were already mentioned with respect to incompatibility, whereas, coerced membership is also prohibited. Some authors established that the citizens' unlimited right to acquire membership derives from the democratic features of the internal organisation of political parties.[35] Whereas, according to the judgement of ECHR, freedom of association does not imply freedom of accession to political parties, since associations are on no grounds obligated to admit all applicants.[36]

With respect to the freedom of terminating membership in political parties, the provisions that guarantee voluntary withdrawal and preclude arbitrary exclusion are of great importance. Arbitrary exclusion is applicable, if the member is excluded for reasons indicated under the deed of foundation of the party, or, it is not the leader of the political party, but the Congress or other Supreme Body that decides on exclusion by a qualified majority. In some countries, political parties are obligated to include the rules of admission and exclusion as an obligatory element under the deed of foundation.[37]

c) Majority Rule and Exclusion of the Leader-Principle

Democratic organisation evidently implicates these elements, however, Hungarian law governing associations and political parties is not explicit on these matters. What is merely stipulated under Art. 12 of Act on Associations is that the powers of the Supreme Body of the political party are secured by law, which is meant to prevent that an oligarchy in the party unsubstantiates internal democracy by acquiring the fundamental powers of members. Accordingly, the most important powers of the Supreme Body shall be: adoption and amendment of the deed of foundation, admission and exclusion of members, election of the Party Leader, liquidation of the political party, nomination of candidates

[34] Decision no. 34 of 1994 of the Constitutional Court (VI. 24.) (AB.), III. 2–3.

[35] For a summary of this view, *see*, Halmai: *Freedom of Association. op. cit.* 143.

[36] *See*, *Cheall v. United Kingdom* (1985). Quoted in: Sólyom: *op. cit.* 105.

[37] Hungarian law does not specify such a rule, nevertheless, *see*, Point (2) of Para. 1 of Art. 9 of Act on Parties in Poland, and Point c) of Para. 2 of Art. 21 of Act on Parties in Russia.

upon the election of representatives to State organs, adoption of the political program of the party. Nevertheless, as to practical experience, we can discern that Party Leaders have overwhelming and ultimate influence over general members.[38]

d) Freedom of Expression of Members and Legal Remedies
Freedom of expression is exercised in the scope of active involvement in the activities of organs of the political party guaranteed under Arts 9–10 of Act on Associations. A member of the organisation may participate in the activities of the organisation, may exercise the right of election or may be elected to its organs. Any member of the organisation may apply for legal remedies *vis-a-vis* majority decisions in case of unlawfulness.

3. Further Factors Determining Political Pluralism

We cannot fail to mention other factors determining the functioning of the system of political parties constitutive of multi-party systems, which are of great importance with special respect to the competition of political parties and their equal opportunities. These may eventuate in a system of a duality or plurality of parties. The provisions of the Constitution that stipulate political pluralism may be expounded in their completeness exclusively with respect to these factors to be reviewed in the following:

3.1. Electoral Systems

Majority electoral systems are destined to favour the most powerful and successful party as well as ignore a large segment of votes, thereby, the composition of legislation fails to reflect the actual variation of the political standing of society. Due to the disproportionateness of such systems, the stability of government majority is satisfactorily achieved, which promotes the efficiency, but obstructs the accountability of Government. Whereas, proportional electoral systems further diversity in representation dependent on the size of constituencies, on the basis of a mathematical formula applied irrespective of the reach of political parties.[39] Therefore, in principle, the proportion of representatives in legislation conforms to the proportion of votes obtained by the specific party, which, however, may entail the instability of government. Mixed-systems,

[38] *See*, Enyedi–Körösényi: *op. cit.* 130–135.
[39] Quoted in: Enyedi–Körösényi: *op. cit.* 255–263.

such as the multi-mandate electoral system attempt to combine the advantages of the two basic systems.[40]

Although, it is primarily majority systems that tend to generate two-party systems, the Hungarian party-system officiously progresses towards a bipolar structure, scilicet, in 2002 and 2006, the two largest political parties obtained 90 p.c. of the votes in national elections. Nevertheless, these results are putatively rather ascribable to electoral behaviour, than to the electoral system.

3.2. Parliamentary Thresholds

Both majority and proportional electoral systems establish thresholds as limitations of access to Parliament, so as to avert the fragmentation of the party-system and of Parliament.[41] However, the system currently prevailing in Hungary obstructs the evolution and empowerment of new political formations, especially in view of the system of public financing of political parties, which further weakens the positions of smaller political parties. Thence, consequential and extensive groups of society lose the chance of representation in Parliament implying that their views fail to influence decision-making by the State and social will-formation.

Reservations concerning thresholds are grounded on the constitutional requirement of the equal opportunities of political parties. According to the argument of the current Head of State of Hungary, the institution of thresholds infringes the principle of equality, because, "although, the threshold limiting access of political parties to Parliament seems to be an objective criterion, the requirement of maintaining the efficiency of the functioning of Parliament cannot justify the prescription of holding the currently effective rate of 5 p.c. or other percentage of the votes for the admission of a political party to

[40] In Russia, which lacked political pluralist traditions, the electoral system was framed by reformers with a view primarily to the establishment of the multi-party system. The system of proportional election has furthered the formation of political parties and movements. Sakwa, R.: *Russian Politics and Society*. New York, 2002. 166–167.

[41] The German *Bundesverfassungsgericht* ruled in 1952 that the 5 p.c. threshold (*Sperrklausel*) prescribed in Schleswig-Holstein was constitutional, since the stipulation of certain degrees of thresholds is admissible, but raising it above this level shall be unlawful. Scilicet, the maintenance of the balance of democratic representation and of the efficient functioning of the legislative organ is imperative. Nevertheless, thresholds are designed to prevent democracy from the fragmentation of the political system. (BVerfGE 1, 208.) Quoted in: Szente, Z.: *Európai alkotmány- és parlamentarizmustörténet* (The History of Constitutionalism and Parliamentarism in Europe). Budapest, 2006. 243.

Parliament."[42] On the contrary, emphasising efficiency entails similar dangers to those inherent in the unlimited proportional electoral system and threaten the functioning of legislation *per se*.[43]

3.3. The system of financing political parties

We've expatiated on the main aspects of the effective system of state subvention of political parties, finally, we need to highlight its effects with respect to the previously mentioned factors of political pluralism. As we noted, the system is based on the principle of efficiency (formerly: aptitude) and on the results of the previous national elections. That system, however, tends to exclude newly emerging and small political parties, since it will recognise them as efficient, on condition that they reach certain results in extremely expensive national campaigns (relying on their own sources). According to this rationale, new and small political parties are expected to compete relying on their own resources, while it is public financing that accounts for the "efficiency" of political parties currently in Parliament.[44] Consequently, the gap between larger and smaller political parties is undeniably widening, since the political parties in Parliament are entitled to extensive, if not unconstitutional privileges, whilst, the ascent of smaller parties is sheerly precluded under the present system.

For the confirmation of this statement, we'll inquire into the results of the national elections of 2006. Accordingly, four political parties in Parliament in the former parliamentary session obtained 97 p.c. of the votes. Only one party could surpass the prescribed 1 p.c. threshold of financing and a new party, that of the Christian-Democratic People's Party was admitted to Parliament on the basis of a coalition agreement with Fidesz as its "pseudo" party. Ceterum censeo– the effective regulation of financing of the multi-party system is designed to protect the concurrent political elite.

[42] Sólyom: *op. cit.* 114.

[43] Haberland, S.: *Die verfassungsrechtliche Bedeutung der Opposition nach dem Grundgesetz* (The Constitutional Concept of the Opposition pursuant to the Constitution). Berlin, 1995. 50, 56–57.

[44] *En passant*, according to the *Bundesverfassungsgericht*, elections are designated to facilitate efficient governance by a parliamentary majority, and this objective shall legitimate the override of fragmented parties. *See*, Ipsen, J.: *A politikai pártok [helyzete a Német Szövetségi Köztársaságban]*. In: *Államtan. Írások a XX. századi általános államtudomány köréből.* [The Position of Political Parties in the German Federal Republic. In: Takács, P. (ed.): Political Science–Studies on General Political Science in 20th Century"]. Budapest, 2003. 726.

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PETRA LEA LÁNCOS*

Case Note: *Ynos* – Intertemporality and the Jurisdictional Jurisprudence of the ECJ

The case *Ynos Kft. v János Varga*,[1] decided by the European Court of Justice (ECJ) on the 10th of January 2006 carries both symbolic and interpretative value. It is symbolic, in the sense that the case relates to the very first reference for preliminary ruling ordered by a court of one of the ten new Member States that acceded in 2004. On the other hand it is also extremely significant from the overall perspective of the new Member States' judiciaries, as the ruling relates to the temporally defined limits of the jurisdiction of the ECJ. The relevance of the ruling may also be further underlined by the fact that a large number of both old and new Member States intervened in the case.[2] The ECJ–probably much to the surprise of many[3]–declined its jurisdiction to answer the questions raised by the Hungarian City Court of Szombathely. Indeed, according to Advocate General Tizzano delivering the Opinion[4] on the case: the ECJ could have declined its jurisdiction on three separate grounds. The interesting feature of the judgement however is exactly *choice* of grounds by the Court of Justice to decline its jurisdiction, as I will try to highlight in the following.

* Research Fellow, Max Planck Institute for Comparative Public Law and International Law
E-mail: plancos@mpil.de, petralea@gmail.com

[1] Judgement of the Court on the 10th of January 2006, C-302/04, Ynos (Judgement).

[2] Apart from the Commission, the governments of Austria, the Czech Republic, Spain, Poland, Latvia and Hungary intervened.

[3] See for example: Zegnál J.: Hungarian property dispute goes to European Court, Budapest Business Journal, 07. 22. 2005. Nemessányi Z.–Kovács B.: Esélylatolgatás az első magyar előzetes döntéshozatal iránti kérelem sorsáról (közösségi jogi és polgári jogi gondolatok), www.jogiforum.hu/publikaciok/215.

[4] Opinion of Advocate General Tizzano, delivered on 22 September 2005, Case C-302/04 (Opinion).

Admissibility

The main proceedings pending before the City Court of Szombathely related to civil claims of Ynos Ltd. based on a standard form agency contract concluded with Mr. Varga in 2002, that is two years before Hungary's accession to the EU. In the course of the proceedings, the defendant Mr. Varga raised the objection that the relevant clause of the contract, on which Ynos' claim was based, constituted an unfair contractual term and the claim must therefore be dismissed.

On the 10th of June, 2004, just one month after the accession of the ten new Member States to the EU the Szombathely City Court referred three questions to the European Court of Justice for a preliminary ruling.[5] The first two questions related to the compatibility of a certain article of Council Directive 93/13/EEC (Directive) on unfair terms in consumer contracts[6] and the relevant article of the Hungarian Civil Code,[7] which had already been enacted in 1997[8] exactly in implementation of the said Directive. The Szombathely City Court took the view, that in so far as the Hungarian norms relevant to the dispute constituted an implementation of the Directive, and in so far as there is a possible conflict between the two norms, the dispute must be resolved in the light of the Directive. Finally, the third question related to the applicability of Community law to a dispute which arose before Hungary acceded to the EU.

Although the Advocate General affirms, that the said Hungarian provisions are incompatible with the Directive in question, the central part of his Opinion deals in essence with the absence of the jurisdiction of the ECJ to rule on the reference submitted by the Hungarian court. Advocate General Tizzano indicates three separate grounds for ruling the reference to be inadmissible:

1. First, and foremost, for reasons of the temporal reach of Community law;[9]
2. Second, for reasons of inadequate statement of facts in the reference submitted;[10]
3. And third, for the questions' lack of relevance to the settlement of the dispute at hand, that is: for reasons of posing a hypothetical question.[11] As the

[5] Order of the Szombathelyi Városi Bíróság, No. P.20.231/2004/19., filed under 706.879 by the European Court of Justice on the 19. 07. 2004.

[6] Art. 6 (1) of Directive 93/13/EEC.

[7] Art. 209 (1) of the Hungarian Civil Code.

[8] Law No CXLIX/97.

[9] Opinion, Items 40–44.

[10] Opinion, Items 52–57.

[11] Opinion, Items 38–39, 63.

Court of Justice ruled the reference inadmissible only on grounds of the temporal reach of Community law, I shall restrict my analysis to this issue.

The temporal reach of Community law: contesting the *"Dzodzi line of cases"*

In his analysis, Advocate General Tizzano reversed the order of the questions, contending, that the answer to the third question, namely the applicability of Community law to disputes arising before accession, might render answering the first two questions redundant. The Advocate General considers the third question to be of a more general reach. In fact, it relates not only to the temporal scope of Community law in Candidate Countries before accession, but–intrinsically linked to this issue–also the preliminary question regarding the jurisdiction of the ECJ to answer questions related to disputes arising under the pre-accession regime.

Reframing the question of the Szombathely City Court on applicability as one of jurisdiction, the Advocate General goes on to delimit the *facts* of the dispute from the *decision* on the dispute in a temporal aspect. Drawing on the principle established by the ECJ to exclude its jurisdiction in cases where the provision of Community law referred for interpretation was "manifestly incapable of applying",[12] he concludes, that as Hungary was not bound by the Directive at the time the facts of the case occurred, the ECJ has no jurisdiction to interpret the provision. Contrary to allegations, that Hungary could be bound by Community law in the pre-accession period due to its implementative obligations under the pre-existing Association Agreement,[13] the Advocate General stresses, that the Association Agreement between Hungary, the EU and the Member States which came into force in 1994 must be interpreted in the light of the Treaty of Accession of 2004.[14] As the Treaty of Accession provides that provisions of the founding Treaties and acts adopted by the institutions shall be binding upon the date of accession, it is only from that time that the new Member States are to be considered addressees of Community law. The fact that Hungary, under the Association Agreement undertook to approximate its legislation to Community law, and that Hungary implemented the said Directive

[12] Opinion, Item 40, referring to C-85/95, *Reisdorf.*
[13] Association Agreement of 16. 10. 1991.
[14] Treaty of Accession of 16. 04. 2003.

already in 1997, does not mean, that Hungary was bound by Community law before the date of accession.[15]

Here, Advocate General Tizzano follows the classic line of arguments long put forward by other Advocates General in relation to the temporal scope of Community law and the respective limitations to the jurisdiction of the ECJ inherent therein. But Tizzano was also cautious to point out that the Court could interpret the Directive on grounds of an overriding Community interest in future uniform application of EC law in the new Member States. On this point he refers to the so-called *Dzodzi*[16] line of cases, where the ECJ in opposition to the opinions of the Advocates General did not decline its jurisdiction where "the facts of the cases were outside the scope of Community law but where these provisions had been rendered applicable by domestic law."[17] As Lenaerts[18] points out, the Ynos case may be seen to fit into this category. The Hungarian Law of 1997 implementing the said Directive clearly refers to the Directive itself.[19] Delgado and Muñoa suggest that the ECJ "as the supreme interpreter of the Community legal order, could not remain impassive to the development of different interpretations by the national courts of the same Community provision".[20] But Advocate General Tizzano, opposing the *Dzodzi* line of cases goes on to state:

> "[However, I must say that such] a conclusion would leave me somewhat perplexed.
>
> If that conclusion were accepted, it would lead to a further extension of a precedent which, I feel, should only be the exception, since, as has been the subject of objection both in the legal literature and by some Advocates General (...) it stretches the scope of the Court's jurisdiction to its limit (...) allowing the Court to give a ruling in cases where Community law clearly does not apply to the main action and there is only a *future*, and therefore purely hypothetical interest in its uniform application."[21]

[15] Opinion, Items 41–44.

[16] C-197/89, *Dzodzi*.

[17] Lenaerts, K.: Unity of European Law and Overload of the ECJ–the System of Preliminary Rulings Revisited, The Global Community. Yearbook of International Law and Jurisprudence 2005. New York, 2006. 225.

[18] *Ibid*, 228.

[19] Art. 11 (5) of Law No CXLIX/97.

[20] Delgado, Muñoa (1992) 29 *Common Market Law Review*, 159.

[21] Opinion, Items 49–50, referring to: C-197/89 *Dzodzi*; C-231/89 *Gmurzynska-Bscher*; C-88/91 *Federconsorzi*; C-73/89 *Fournier*; C-130/95 *Giloy*; C-28/95 *Leur-Bloem*; C-7/97 *Bronner*; C-1/99 *Kofisa Italia*; C-267/99 *Adam*; C-43/00 *Andersen og Jensen*.

The judgement: temporal delimitation of jurisdiction

In its Findings the Court laconically states:

> "In this case, as the facts of the dispute in the main proceedings occurred prior to the accession of the Republic of Hungary to the European Union, the Court does not have jurisdiction to interpret the Directive."[22]

The only available precedent the ECJ draws on to substantiate this reason for declining jurisdiction is the case *Andersson* from 1999.[23] In its ruling on *Andersson*, the ECJ stressed: "The fact that the EFTA State subsequently became a Member of the EU (...) cannot have the effect of attributing to the Court of Justice jurisdiction to interpret the EEA Agreement as regards its application to situations which do not come within the Community legal order".[24] Implying that the case underlying Ynos does not come within the Community legal order, the ECJ discards the further reasons for declining jurisdiction set forth by the Advocate General and delimits the temporal scope of its own jurisdiction establishing a clear temporal framework for future references.

The innovative feature of this judgement lies in a departure of the ECJ from its previous, flexible approach to references of pre-accession background. This judgement, delivered on the first reference ever submitted by a new Member State court marks a new era of jurisdictional jurisprudence of the ECJ. Without explicitly touching upon the temporal reach of EC law as regards applicability, the Court certainly clarifies its jurisprudence related to the temporal aspects of its jurisdiction. It was obvious, that the first references from the new Member States would be linked with temporal aspects of Community law. Therefore, he ECJ probably saw fit to decide this question on the very first possible occasion perhaps to channel these future references. That this judgement is based on a premeditated decision to limit a possibly great number of inter-temporal references may further be supported by the fact that it does not necessarily follow from the hitherto existing case-law of the ECJ. To name just a few examples:

In *Data Delecta,*[25] the Court disregarded temporal concerns put forward by the Advocate General and delivered a ruling on a question of a Swedish appellate court submitted just after accession. Obviously, all facts of the case as well as

[22] Judgement, Item 37.
[23] C-321/97, *Andersson*.
[24] *Ibid*, Item 30.
[25] C-43/95, *Data Delecta*.

the first instance judgement had occurred before accession, but the ECJ refrained from addressing the question. Similarly, in *Konle*,[26] the Court of Justice accepted its jurisdiction, although the facts of the underlying Austrian case and the respective contested decision occurred before accession. It must be pointed out however, that contrary to the Hungarian court in *Ynos*, the referring Austrian court did not raise this temporal aspect in its reference.

In *Saldanha*,[27] the Austrian court in its reference stated, that in accordance with Austrian procedural law, Community law had mandatory effect to pending cases from the date of accession. The Advocate General objected that the temporal scope of Community law cannot be determined by reference to national law. The ECJ however, overruled the Advocate General's opinion, and ruled on the immediate applicability of Community law for future effects of situations arising prior to accession.

Finally, in *Beck and Bergdorf*,[28] as well as in *Stefan*,[29]–two cases concerning pre-accession contractual relationships–the ECJ affirmed its' jurisdiction as well as the immediate effect of Community law.

Conclusion: possible motivations of the Court

Why, then, has the ECJ departed from this broad approach to the temporal scope of Community law and its respective jurisdiction? The relevant literature points out, that most of the above cases related to rules of judicial and administrative procedure and not substantive law; although, as also noted, this perspective would mean that the application of Community law could be divergent in the Member States, depending on the respective national distinctions between substantive law and procedural law.[30]

Another point raised, is that the only other case, namely *Andersson*, where the ECJ expressly dealt with temporal aspects *and* declined its jurisdiction, related to a situation that had been completely settled and therefore also would not have had any further legal effects. The judgement reflected the Opinion of Advocate General Cosmas suggesting a delimitation between settled or "fixed"

[26] C-302/97, *Konle*.
[27] C-122/96, *Saldanha*.
[28] C-355/97, *Beck*.
[29] C-464/98, *Stefan*.
[30] Kaleda, S. L.: Immediate Effect of Community Law in the New Member States: Is there a Place for a Consistent Doctrine? *European Law Journal* (2004) 111–112.

situations involving true retroactivity and "existing" situations still producing legal effects involving quasi-retroactivity and immediate application.[31]

Most probably the ECJ wishes to introduce a coherent framework for the temporal scope of EC law, and would like to affirm its jurisprudence put forward in the *Andersson* case. Possibly facing a great number of comparable references from the new Member States, the Court of Justice seized the opportunity to ascertain the limits of its jurisdiction. All in all, the judgement bears great relevance for the new Member States. If the ECJ was willing to give rulings in previous inter-temporal cases based on a favourable attitude toward references from new Member States, these times are over. The sole guidance the new Member States judiciary may seek from the Court in such inter-temporal cases lies in its established case-law, which they are bound to know.

[31] For a detailed discussion, see: Kaleda (2004), 104.

MAGYAR
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CSABA VARGA*

Comparative Legal Cultures?

Renewal by Transforming into a Genuine Discipline

Abstract. 'Comparative law' was born to challenge national self-centredness at the turn of the 19th to 20th centuries, without transcending–notwithstanding its admission of social and cultural-historical approaches in the study of law–the perspectives of rule-positivism. 'Comparative legal cultures' attempts at explaining the prevailing cultural and traditional diversity that has generated, among others, western law with its modern formalism and the alternative ways of reaching social order in other cultures. By its focus upon the underlying culture and, thereby, also upon the hermeneutic understanding of legal phenomena, the latter is expected to offer growingly adequate responses to timely questions such as the universalisability of law and human rights, the convergence of the continental Civil Law and the British Common Law, or the development and future of the legal set-up in the Central and Eastern European region.

The interest of the comparative study of legal cultures is thus one in the history of ideas, dedicated to human problem-solving as the cultural response of people to external challenges. For the description of living complexes in terms of mere rules can result at most in 'thin description' with the exclusion of 'thick description', the more so as rules (just as concepts) are only the consequences of a kind of possible representation, therefore, relying exclusively upon them may contribute to dissolving even prevailing interrelations, atomising organic components as fragmented into detached elements. Or, institutional thinking notwithstanding, not even the subject's formalism can serve as a ground for restricting human completeness and integrity, cultural diversity, as well as responsibility to be taken for these.

Keywords: comparative law & comparative legal cultures; law as text & reduction of law to rules; understanding of socialist law & transition to rule of law; rapprochment & convergence of Civil Law and Common Law

1. Legal Comparativism Challenged

Human thinking is not only uninterruptedly continuous, but even when viewed as a process, it cannot be described otherwise than as a kind of oscillation. In this oscillation, besides power concentrations alternating with each other and

* Scientific Adviser, Institute for Legal Studies of the Hungarian Academy of Sciences, H–1250 Budapest POB 25; Professor, Director of the Institute for Legal Philosophy, Pázmány Péter Catholic University of Hungary [http://varga.jak.ppke.hu]
E-mail: varga@jak.ppke.hu

adding up to wave crests and wave-troughs, any prevailing movement arises as a result of the ceaseless whirl of currents–and thereby drifts–coming from various directions. Routine and practical experience provide us some help from the past–forming a framework for our everyday action and, moreover, holding out promises of a perspective, a kind of illusory security–, however, in our presence at any given time, it is us who define fixed points for ourselves, in order to be able to arrange the entities at our disposal, as well as our concerns, into a kind of order at all. Therefore, when perceiving our ongoing occupations either as problem-solving or as acts of creative power, we have to be aware that, considered from a future perspective, all this may seem nothing other, or more ambitious, than just one of the episodes of stumbling from one blind alley into another.

What is, then, the proper way of cultivating scholarship at all? While looking for continuity from the past and for identity in the present, we are understandably conservative in designating our interest. When referring to our specific subject, we still speak of 'legal theory' in educational contexts, while we mention 'philosophy of law' at our biannual world congresses as accustomed since the founding act of the International Association for Philosophy of Law and Social Philosophy in Berlin in 1909; although the topics of subjects we teach and of scholarly papers we present do not recall, even in the way they pose a question or in their conceptual culture, the tradition acquired from previous generations in our youth. Namely, instead of "the system of legal sciences", of "legal axiology" or the "theory of legal relations", fashionable in the past decades, nowadays "semantics", "hermeneutics" and "legal reasoning" or "logical analysis of law" are customarily dealt with. For the issues related to the "concept of law" or "legal ontology and epistemology" have all become, if you like, outdated, archaic and irrelevant as traditional fields: the question of philosophical foundation has, for decades now, been replaced by the thrill of the social construction of reality[1] that may lurk behind the scenes of manipulative applications we are

[1] For the term, see Berger, P. L.–Luckmann, Th.: *The Social Construction of Reality.* A Treatise in the Sociology of Knowledge. New York, 1966. Questions not properly considered up to the present are why and how the philosophical perspective and the requirement for thorough foundation have disappeared from our legal thinking over the past few decades, and what they have been or are going to be replaced by, if at all. From the British analytical jurisprudence (e.g., H. L. A. Hart, J. Raz and N. MacCormick) to the American and Western European theories of reasoning (e.g., R. M. Dworkin on the one hand, and A. Aarnio, R. Alexy and A. Peczenik on the other), law is simply taken as given in an unquestioned culture, as are the social values and the culture of reasoning, held as specifically characteristic of a given community. By supposing their having been accepted from the very start, the task of legal theory now seems to be simply confined to raising

nowadays driven to incessantly search for. For what else could the way of scholarly interest be? All we can try is to respond to renewed challenges which–alongside new considerations, methodologically proven statements and conceptual distinctions–launch new waves and provoke currents, while the actors in the debates among the various positions emerging within these mostly turn back only very rarely and randomly to viewpoints, considerations and arguments dismissed as unworthy of further debate earlier in the discussion, and which viewpoints, consequently, had drifted away from the mainstream.

The same holds true of the comparison of laws which emerged as part of the comprehensive movement of comparativism by the advent of the "age of comparison", as Nietzsche once rightly noted.[2] When the inquiry into the various particularities of human construction, community language, national law (etc.) proved too limited to develop further towards the end of the 19th century in the cult of positivism, "comparative anatomy", "comparative linguistics" and "comparative jurisprudence" emerged as a result. Of course, this could only imply a radical change away from the normal course of development, where also the self-closing retirement into the subject's own particularity was most determinedly pushed to the extreme. Accordingly, it is not by chance that it was France, the native land of national chauvinism, to become the centre of comparative jurisprudence, and the European continent became preferred as its number one field of investigation. However, all the comparative movement in law has proved to be a non-recurrent task. In its turn, the very mention of such non-recurrence involves the recognition that, in the history of thinking, "isms" in general are inevitably bound to be assimilated step by step into and eventually absorbed by human thought in formation: as soon as the revolting breakthrough is made and reformatory thought is accepted, it ceases to survive as a separate entity. Just as present-day debates do not use terms of, e.g., Platonism or structuralism any longer, there is no specific need to explain why we resort to and call for–among others–comparison in our scholarly work. It is enough to note, maybe, that it is no longer usual for any monographic treatment of legal topics to be done without a genuine comparative-historical approach in the background.

Well, as far as the association of qualifying terms 'comparative' and 'historical' is concerned, only our once characteristic narrow-mindedness and

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awareness to, by explaining and developing also in details of interrelations, the human manipulative practice shaping the law in action. As a particularly telling panorama, see Luc, J.–Wintgens, L. J. (ed.): *The Law in Philosophical Perspectives.* My Philosophy of Law. Dordrecht–Boston–London, 1999.

[2] Nietzsche, F.: *Humain, trop humain* [1878]. Paris, 1988. 49–50.

our self-closing into national boundaries in legal scholarship can explain why our Civil Law predecessors on the European continent had to emphasise, in their one-time breakthrough, the necessity of comparison (and not that of historicity) as being most in need of development. For historical jurisprudence, evolving around the middle of the 19th century within the Common Law as a follow-up of legal development generated by the practice of judicial decisions (having been cumulated one upon another as judicial precedents), was an entirely natural outcome;[3] moreover, due to the shift of emphasis in the practical life of law to the search for judicial reason that arrives at declaring what the law is through a specific methodology of problem-solving, jurisprudence was not urged to transcend national borders, as it already achieved to carry out free search for similar sources in its quest for meaning, on the one hand. On the European continent and especially in France, on the other, the emphasis had for long been centred on the legislator as the representative and symbol of a national will and, therefore, any legal development could only be considered a national accomplishment. This is the reason why, with us, historical interest was gradually left out of the topicality of positive law, to form some complementary and additional subject as a separate discipline, both external to and irrelevant for everyday practice.

As noticed above, having achieved the breakthrough, legal comparativism has lost its specific function. For a moment, let us contemplate: if every analysis is already based on a historico-comparative approach, whoever would need a particular movement suitable just to force open doors? Continental positivism as the scholarly stand based upon the exclusive moment of statutory text-enactment became to a certain extent antiquated by the first third of the 20th century anyway and, by the middle of the same century, the emphasis shifted firmly to the judicial process which was also to involve moments of social and cultural conditioning, thereby opening the gates to textual hermeneutics. Step by step, the text-positivism of the one-time legislatory definition of the law[4] and also the sociologism relating to the law's social environment[5] have eventually

[3] Cf. Szabadfalvi, J. (ed.): *Historical Jurisprudence.* Budapest, 2000. 14–35 and 281–285, respectively.

[4] Cf., e.g., Varga, Cs.: *Codification as a Socio-historical Phenomenon.* Budapest, 1991., especially ch. V. paras. 2/a and 4, introducing on the example of the classic type-framing *Code civil* (1804), how the definition of the law through legislatorial text in the juridical exegesis, characteristic of the early 19th century, has become gradually reduced to the role of providing a merely referential framework and disciplinary medium for the otherwise growingly free judicial declaration of what the law should be and/or is.

[5] It is remarkable that anything in germ of a sociology of law had been heralded in parallel with the theoretical assertion of legal positivism, when two professors with same

been replaced by the open-chanced pondering of any (con)texture of the present, in which the questions "from where?" and "what?" are increasingly substituted by the ones of "how?" and "to what?".[6]

Even in the field of law, the scene of our everyday life no longer seems to be just a case of determinations, but the starting point of creative and decisive switchings actually effected by each of us at any moment in those several roles we play, and thereby also the free medium for the manipulation of everything we have appropriated from our environment. As a consequence of all the above, the increase in awareness of the multiple and thorough repercussions of the humanities as a scholarly tradition upon the law and the requirement of social theoretical approach in legal thinking, the examination of law in parallel with other social regulative forces, as well as the adoption of an anthropological perspective (in the light of which law seems to be just one of the possible representations of the ideal of order required for any social formation), well, all these have led to a change in the search for specificity in law more powerfully in the context of culture as a whole (or, more precisely, in the context of the cultural response we offer in law to the various challenges, characteristic of the given human community and civilisation).[7]

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backgrounds in Vienna, Hans Kelsen, formulating in theory the self-defining self-identification of positive law, on the one hand, and Eugen Ehrlich, appointed to the new university of Czernowitz and theorising upon his new experience relating to the mess of co-existing folks and laws in Bukovina and Galicia in order to finally realise the empirical justifiability of some "living law" with no official support whatsoever in the background, on the other, contrasted sociologism and positivism in legal thinking. For the debate in *Archiv für Rechts- und Wirtschaftsphilosophie* from 1916 to 1917, see Stanley L. Paulson (hrsg.): *Hans Kelsen und die Rechtssoziologie.* Aalen, 1993.

[6] For the theoretical background, cf. Varga, Cs.: An Inquiry into the Nature of the Judicial Process. In *I[nternationales]R[echts]I[nformatisches]S[ymposium] 2006* Proceedings [Vienna, February 2006] {A bírói folyamat természetének kutatása. *Jogtudományi Közlöny* XLIX (1994) 11–12, 459–464} and, in monographic treatment, his *Theory of the Judicial Process* The Establishment of Facts. Budapest, 1995. as well as his The Context of the Judicial Application of Norms, in: Krawietz, W.–MacCormick, N.–von Wright, G. H. (ed.): *Prescriptive Formality and Normative Rationality in Modern Legal Systems,* Festschrift for Robert S. Summers. Berlin, 1994. 495–512 [for paras. i–ii] and Law, Language and Logic: Expectations and Actual Limitations of Logic in Legal Reasoning, in: Ciampi, C.–F. Socci Natali–G. Taddei Elmi, I (ed.): *Verso un sistema esperto giuridico integrale.* Padova, 1995. 665–679.

[7] For a theoretical justification and background, cf. Varga, Cs.: A jog mint kultúra? [Law as culture?] *Jogelméleti Szemle* 2004/3 <http://jesz.ajk.elte.hu/varga11.html> as well as Macrosociological Theories of Law: From the »Lawyer's World Concept« to a Social Science Conception of Law. In: Kamenka, E.–Summers, R. S.–Twining, W. (ed.):

2. Comparative Legal Cultures versus Comparative Law

As a consequence, the starting point is no longer either the law of a nation or its sectoral history, but the cultural medium in continuous formation, in which references, as the fixed and fixing points of human thinking and action–beliefs and values, preferences and aims, traditions and skills, methods and procedures–may have developed in a given (and not another) way, that is, the medium in which a certain (and not another) notion of order and the associated (and not another) store of instruments (with a proper conceptual scheme and the role it may attribute to abstract logic) could evolve. If, in an inverse move, we start thinking from the endpoint, this explains why the comparative study of legal cultures neither supposes any kind of codified list, nor any set of questions, nor taxonomy, nor previously established methodology, regarding (or following) which the discipline of comparative legal cultures and its focus on the whole variety of cultures and ages should provide a response. Just to the contrary. According to its inherent approach, out of itself and through its in-built learning processes, each culture generates proper (general and sectoral) formations, frameworks and schemes, often ones and in manners characteristic exclusively of it–approaches and problem-sensitivities, organisational principles and notional distinctions, institutionalisations and procedural paths, methods and skills–, which are suitable, in their systemic totality, to define the specific character of an order which is going to be described by us *a posteriori* as a legal one, particular to the given culture.

By this point, we can claim to have indeed arrived, from the classical movement known as 'comparative law', at the cultivation of 'comparative legal cultures'. For our inquiry neither stays within the boundaries of law, nor does it start from an analysis of the available store of positive legal instruments, nor is it determined by the latter. For the most part, it concentrates neither on our ongoing present, nor wishes to contrast the formalised institutions–provided that they can be related at all–of certain nations to those of others. Instead, it attempts, with a cultural anthropological focus, to examine different possibilities (potentials and availabilities) as historically formed alternatives from a civilisational developmental perspective. The question here is exactly why a particular (and not another) legal idea and institutionalisation emerged in a given medium. And

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Soziologische Jurisprudenz und realistische Theorien des Rechts. Berlin, 1986. 197–215. [Rechtstheorie, Beiheft 9] and Macrosociological Theories of Law: A Survey and Appraisal. *Tidskrift för Rättssociologi* III (1986) 3–4, 165–198.

the question it intends to answer is: why and how a certain (and not another) store of instruments has developed in the given place and time from all of this?[8]

'Comparative legal cultures'? How have we arrived at this very term? The linguistic expression itself is obviously a derived further development from the disciplinary term of 'comparative law' as widely accepted today. For this very reason, justified criticism for the former relates and applies to the latter as well. For it should be admitted that in their literal senses both the basic term and its derivation are, properly speaking, meaningless (and entirely alien to the very spirit of language), as contrasted to the properly compounded French terms *droit comparé* ['compared law'='law that is compared, i.e., taken in comparison'] and *cultures juridiques comparées*. Despite this all, it is still capable of easy identification, and it is obvious for everyone that it is, by its very meaning, nothing other than a simplified and shortened version for the complex expression of the 'comparative study of law [and, respectively, of legal cultures]'.

Apart from the rudimentary recognition of the obvious truth according to which "every national law should be explained as a proper part of human culture",[9] the movement of comparative law neither sought nor realised anything other than its own release from the national seclusion of domestic legal positivisms. Although the worldwide leading classic of legal comparativism from our recent past rightly claimed that

> "the comparison of laws is an important general cultural means for the lawyer, without which–and without the historical background serving as its completion and homologue–one cannot arrive at conclusions beyond the sphere of the given law and thus at a universality required of any genuine scholarship",[10]

the discipline has not subsequently become anything more than a sheer method–however necessary it may be for any scholarly result to be reached–, selected

[8] As a former research project proposal by the author, see his A jog és történelmi alternatívái [Law and its historical alternatives]. [1982] in: his *Útkeresés* Kísérletek – kéziratban [Searches for a path: unpublished essays]. Budapest, 2001. 127–131.

[9] Kohler, J.: Über die Methode der Rechtsvergleichung. *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* XXVIII (1901), 273–284.

[10] David, R.: Le droit comparé, enseignement de culture générale. *Revue internationale de Droit comparé* II (1950), 682–685. Cf. also Péteri, Z.: Some Aspects of the Sociological Approach in Comparative Law, in: Péteri, Z. (ed.): *Droit hongrois – droit comparé* Études pour le VIII[e] Congrès international de droit comparé. Budapest, 1970. 75–94.

out from the obviously desirable methodological complexity. In addition to the fact that bi- and multilateral comparisons of national laws have since (and largely due to this very movement) become accepted in scholarship, its fundamental and imperishable merits include having drawn up the actual[11] and intellectually processed and historically developed[12] global map of the world's legal systems;[13] having taken the pioneering initiative of elaborating categories used for classifying (by drawing "family resemblances" for) the various legal orders and arrangements, together with having undertaken a largely static, descriptive presentation of the laws and orders on both a universal and especially a European

[11] See, e.g., Randall, H. J.: Law and Geography. In: Kocourek. A.–Wigmore, J. H. (ed.): *Evolution of Law* Select Readings on the Origin and Development of Legal Institutions III. *Formative Influences of Legal Development.* Boston, 1918. ch. 6; Wigmore, J. H.: A Map of the World's Law. *The Geographical Review* 19 (1929), 114–121 [starting from the statement that nine-tenth of the Earth's population is governed by a dozen of laws, among which the Anglican, the Germanic, the Hindu, the Islamic, the Japanese, the Chinese, the Romanesque and the Slav ones continue exerting mass influence, while the Egyptian, the Greek, the Hebrew, the Canon, the Celtic, the Mesopotamian, the Roman and the maritime laws have in their original quality disappeared since]; Desserteaux, M.: Droit comparé et géographie humaine. *Annales de Géographie* LVI (1947), 81–93. [mostly identifying European legal ideas with their Christian roots "at present actually extant too" (83, note 2, as well as 85); and placing, in a remarkable way, the "mixed Roman method" between the "German" deductivism and the "English" inductivism, which, in case the statutory solution is deficient, applies, in addition to the deductivity of inferences from statutory dispositions, subsidiary empirical constructions inductively (in French, Spanish or Swiss law) or relies on French *jurisprudence* as a suppletive source (in Belgian or Rumanian law) (86); and foreseeing a joint intermediate method as the proper future solution for Europe (92)]; David, R.: La Géographie et le Droit. *La Revue de Géographie humaine et d'ethnologie* 2 (1948), 78 et seq.; Sand, P. H.: *Current Trends in African Legal Geography* The Interfusion of Legal Systems. New York, [1971]. 27.; E. S. Easterly, III: Global Patterns of Legal Systems: Notes Toward a New Geojurisprudence. *Geographical Review* 67 (1977), 209 et seq.; Guelke, L.: The Role of Laws in Human Geography. *Progress in Human Geography* 1 (1977), 376 et seq.; Economides, K.–Blacksell. M.–Watkins, Ch.: The Spatial Analysis of Legal Systems: Towards a Geography of Law? *Journal of Law and Society* 13 (1986) 161–181.

[12] See, e.g., Wigmore, J. H.: *A Panorama of the World's Legal Systems* I–III. St. Paul, Minn. 1928.

[13] For a historical overview, cf. Varga Cs.: *Theatrum legale mundi* avagy a jogrendszerek osztályozása, in: Szilágyi, I. H.–Paksy, M. (ed.): *Ius unum, lex multiplex* Liber Amicorum: Studia Z. Péteri dedicata (Studies in Comparative Law, Theory of State and Legal Philosophy). Budapest, 2005. 219–242. and On the Classification of Legal Systems [Abstract], 243–244.

level.[14] In this way, it has succeeded in raising the awareness of the relativity, the uniqueness, as well as the considerably accidental character of the various national legal orders, taken as the exclusive subject of jurisprudence since the classical age of the codification of national laws.

To the luck of us all, introduction to the main legal systems of the world under the heading of "comparative law" has become almost a *sine qua non* of legal education; as an independent scholarly trend, however, it soon became exhausted. Scholars and critics have for decades now been constantly complaining of its being "obstinately repetitive and sterile",[15] of its having a "precarious character"[16] of a "mediocre quality",[17] resulting in "disappointing"[18] "theoretical misery",[19] ending in "marginalisation"[20] and "superficiality",[21] all in all, in methodological and theoretical "failure",[22] rightly "plagued by the absence of any sustained theoretical reflection on [...] that comparative law is nothing more or less than a methodology".[23] As an expression of this depreciation through

[14] E.g., Schlesinger, R. B.: *Comparative Law* Cases and Materials. Brooklyn–London, 1950.; David, R.: *Traité élémentaire de droit civil comparé* Introduction à l'étude des droits étrangers et à la méthode comparative. Paris, 1952.; Arminjon, P.–Nolde, B.–Wolff, M.: *Traité de droit comparé* I–III. Paris, 1950–1952.; Schnitzer, A.: *Vergleichende Rechtslehre.* Basel, 1945. [I–II, Zweite Aufl. (Basel, 1961)]; David, R.: *Les grands systèmes de droit contemporains.* Paris, 1964.; Duncan, J.–Derrett, M. (ed.): *An Introduction to Legal Systems.* London, 1968.; Zweigert, K.–Kötz, H.: *Einführung in die Rechtsvergleichung* auf dem Gebiete des Privatrechts, I [Grundlagen]–II [Institutionen]. Tübingen, 1971–1969.; Constantinesco, L. J.: *Rechtsvergleichung* I–III. Köln, 1971–1972.; David, R. et al. (ed.): *International Encyclopedia of Comparative Law.* Tübingen, 1973–1985.; Rheinstein, M.: *Einführung in die Rechtsvergleichung.* München, 1974.; Eörsi, Gy.: *Comparative Civil (Private) Law* Law Types, Law Groups, the Roads of Legal Development. Budapest, 1979.; Rodière, R.: *Introduction au droit comparé.* Paris, 1979.; Schlesinger, R. B.–Baade, H.–Damaska, M. R.–Herzog, P. E.: *Comparative Law* Cases–Text–Materials. 5th ed. Mineola, N. Y., 1988.; Bogdan, M.: *Comparative Law.* Deventer–Cambridge, 1994.; Fromont, M.: *Grands systèmes de droit étranger.* 2e éd. Paris, 1994.

[15] McDougal, M. S.: in *The American Journal of Comparative Law* I (1952), 29.

[16] Hall, J.: *Comparative Law and Social Theory.* Baton Rouge, 1963. 6.

[17] Rigauxm F.: in *Revue du Droit international et de Droit comparé* XXX (1978), 73.

[18] Shapiro, M.: *Courts.* Chicago, 1981. vii.

[19] Constantinesco, L.-J.: *Traité de droit comparé.* III. Paris, 1983. 21.

[20] Frankenberg, G.: Critical Comparisons: Re-thinking Comparative Law. *Harvard International Legal Journal* 26 (1985) 2.

[21] Watson, A.: *Legal Transplants.* 2nd ed. Athens–Georgia, 1993. 10.

[22] Legrand, P.: Comparative Legal Studies and Commitment to Theory. *Modern Law Review* 58 (1995), 262.

[23] Samuel G.: Comparative Law. In: Gray, Ch. B. (ed.): *The Philosophy of Law* An Encyclopedia. New York–London, 1999. 137.

external evaluation, it has recently been omitted from a collective representation of social sciences, not being listed as one of the many international comparativisms taken into account.[24] In addition to rewriting the above mentioned map time and again and to promoting legal borrowing and the law's adaptation,[25] the most important of its tasks today is to serve the harmonisation and the prospective unification of laws and also the codification of a common European private law. In its turn, all this reinforces the discipline exactly in its standing decisive features, namely, at a focus on prevailing (valid and effective) regulations, its reliance upon positive law and handling the law as a given and ready-made instrument.

In contrast to the classical stance of comparative law, the comparative study of legal cultures has from the very start been interested in the genesis and formation of the law's various phenomena and operations, that is, in how law evolved within various civilisations, producing various cultural responses in human efforts at problem solving, with varying moral and religious foundations and value preferences in successive ages in a way rebuilding again and again. Or, this is also an interest in the history of ideas, manifesting itself in the general frame of the history of civilisations, dedicated to societal problem-solving capacity even when we are making formal and homogenised instruments and institutions, to arrive at a picture of the evolutionary progress sometimes taken as traditional history, characteristic of the given civilisation(s),[26] or to arrive at a

[24] The special issue of *La Revue européenne des Sciences sociales* (1986) mentioned only anthropological, economic, linguistic, psychiatric, religion-historical and sociological comparativisms as living. For the above criticism of comparative law, see especially Legrand, P.: *Le droit comparé.* Paris, 1999., passim, particularly at 8.

[25] "Borrowing from abroad has become a recognised legislative practice in most contemporary states." Sand: *Current Trends in African Legal Geography. op. cit.* 24. We have widely recognised since the elaboration of "cultural patterns" by Lévy-Strauss, C.: *Les tristes tropiques.* Paris, 1955.–that "the comparatively rapid growth of human culture as a whole has been due to the ability of all societies to borrow elements from other cultures and to incorporate them into their own." Linton, R.: *The Study of Man* An Introduction. New York, 1936., 324. For a critical overview with a critical assessment, cf. Varga, Cs.: Transfers of Law: A Conceptual Analysis, in: Mamoru Sadakata (ed.): *Hungary's Legal Assistance Experiences in the Age of Globalization.* Nagoya, 2006. 21–41. {with an abstract–Reception of Legal Patterns in a Globalising Age–in: Jiménez, J. J.–Gil, J.–Peña, A. (ed.): *Law and Justice in a Global Society.* Addenda: Special Workshops and Working Groups (IVR 22nd World Congress, Granada, Spain, 24–29 May 2005). Granada, 2005. 96–97.}.

[26] E.g. Fikentscher, W.–Franke, H.–Köhler, O. (ed.): *Entstehung und Wandel rechtlicher Traditionen.* Freiburg–München, 1980.; Jesús Lalinde Abadía: *Las Cultures represivas de la humanidad* (H. 1945) I [Adat y otras (pueblos infraevolucionades), Darma (Sudeste

cultural anthropological explanation of the legal choices we make,[27] or to arrive at the construction of a comparative functional representation of the actual state that can be concluded from the practical appearance, utilisation and enforcement of the law through the sociological description of the medium by, and within, which law is conditioned and operated.[28]

Obviously, another ethos, another interest and another problem-sensitivity are at work here when they are related to the ones employed in the pioneer age of comparison. The path is evidently not already paved, and–instead of mere intellectual arguing–a new trail can only be broken if we set out on it. "Those who can, do it, those who cannot, explain it"–despite its one-sided injustice, this traditional wisdom tells a lot about the one-time Prussian pattern, so deeply ingrained in the socialist regime imposed upon us, thoroughly over-ideologised. For we know: in huge parts of Moscow-dominated Eastern and Central Europe, cultivation of scholarship was virtually impossible, yet lengthy explanations introducing emptied textbooks proudly declared the abstract aspiration for a scholarly quality in the foursome of subject, method, structure, and purpose, which were set in stone. "Too much argumentation kills the deed"–every thinker is expected to assume personal conviction and humility so that even if he is quite uncertain or formulates sheer presumptions, he shall cover the entire path of cognition.

An open question is, therefore, what the student of comparative legal cultures can achieve over the long run. Another question is the assessment of the reserves inherent in the bulk of fragmented studies comparing legal cultures, which have been published so far. A number of papers, coming from

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asiático), Chíng (Extremo Oriente), Meecharu (Oriente Medio), Maat (Antiguo Egipto), Díke (Antigua Grecia), Ius (Roma-Biyancio), Torá (Judíos), Charía (Árabes)] – II [Directum (Europa latina e Iberoamérica), Reht (Europa germánica), Jog (Hungría), Prawo (Europa eslava), Common law (Mancomunidad anglo-sajona)]. Zaragoza, 1992.; and, most recently, Glenn, H. P.: *Legal Traditions of the World* Sustainable Diversity in Law. Oxford, 2000. For the last title, cf. also Varga Cs.: Legal Traditions? In Search for Families and Cultures of Law. *Acta Juridica Hungarica* 46 (2005), 177–197.

[27] In addition to the first title in note 29, cf. also Feest, J.–Blankenburg, E. (ed.): *Changing Legal Cultures.* Oñati, 1997.; Nelken, D. (ed.): *Comparing Legal Cultures.* Aldershot, 1997.; Feest, J.–Nelken, D. (ed.): *Adapting Legal Cultures.* Oxford, 2001.; Bell, J. (ed.): *Comparative Legal Cultures.* [Aldershot: Dartmouth (in preparation)].

[28] E.g., by Blankenburg, E.: Legal Cultures Compared, in: Ferrari, V. (ed.): *Laws and Rights.* Bologna, 1991. 93–101., Culture juridique comparative, in: Arnaud, A.-J. (ed.): *Dictionnaire encyclopédique de théorie et de sociologie du droit.* 2e éd. Paris, 1993. 141–142. and Civil Litigation Rates as Indicators for Legal Cultures, in: *Comparing Legal Cultures. op. cit.* 41–68.

the discipline of 'comparative law' strictly taken and, labelled as irrelevant, neither collected, nor studied by genuine comparativists, have, notwithstanding, investigated certain culturally relevant legal issues.

3. Contrasting Fields

Interestingly enough, the route I have tried to explore[29] has received confirmation (thought-provoking themselves, and opening up new prospects as well) from most unexpected quarters in the recent past. In an attempt to describe the legal systems of Central and Eastern European countries now on the path of their transition to the rule of law,[30] on the one hand, and in an effort to challenge the allegedly spontaneous convergence of the historical blocks of Civil Law and Common Law development, to be completed anyway through the European legal *rapprochement*,[31] on the other, it has been noted that the "dogmatically entrenched and thoughtlessly transmitted preconceptions" of classical comparative law (which "often operate as false generalisations and universalisations of what are, in fact, little more than localised, western-liberal perspectives"[32]), owing to their "epistemological barrier",[33] actually close down and block the way to cognition, instead of opening up and paving–by substantiating–it. For reducing law to mere rules not only transmits an image which falsely represents legal experience[34] but, by its search for rationality, foreseeability, certainty, coherence, and clarity at any price, it also "strikes a profoundly anti-humanist note".[35] By reducing the complexity of the law's actual operation to

[29] Varga, Cs. (ed.): *Comparative Legal Cultures*. Aldershot–Hong Kong–Singapore–Sydney–Dartmouth–New York, 1992., as well as Varga, Cs.: Comparative Legal Cultures: Attempts at Conceptualization. *Acta Juridica Hungarica* 38 (1997), 53–63.

[30] Puchalska-Tych, B.–Salter, M.: Comparing Legal Cultures of Eastern Europe: The Need for a Dialectical Analysis. *Legal Studies* 16 (1996) 2, 157–184.

[31] Legrand, P.: European Legal Systems Are not Converging. *The International and Comparative Law Quarterly* 45 (1996), 53–81.

[32] Puchalska-Tych–Salter: Comparing Legal Cultures of Eastern Europe... *op. cit.* 159.

[33] Legrand: European Legal Systems Are not Converging. *op. cit.* 60. For the concept of "*obstacle épistémologique*", see Bachelard, G.: *La formation de l'esprit scientifique* Contribution à une psychanalyse de la connaissance objective, 14e éd. Paris, 1989.

[34] Cf. Salter, M.: The Idea of Legal World. *International Journal of the Legal Profession* 1 (1994), 291–295.

[35] Puchalska-Tych–Salter: Comparing Legal Cultures of Eastern Europe... *op. cit.* 179, as well as Legrand: European Legal Systems Are not Converging. *op. cit.* 60.

the static and abstract formalism of one given official state doctrine,[36] classical comparative law can at the most reproduce such complexity only in a superficial and simplifying way.[37]

a) The Historical Understanding of Socialist Law

As far as socialist law is concerned, 'comparative law' had–as the above mentioned British comparatists claim–generated a quite artificial concept upon the basis of an ideal type that had never actually existed anywhere. For it reduced various national legal systems with differing historical backgrounds and developmental abilities to one common denominator[38] upon the basis of Muscovite-type imperialism alone (while formulating, in a sanctimonious way, an implicit theoretical justification for the then convenient Western politics of submissiveness). Ironically–shall we add–the collapse of communism was necessary for Western complacency eventually to realise that Westerners had seen something of themselves in socialism, while they easily ignored the features that had made communism so inhumane, destructive, unbearable and fatal as it was. For instance, never having been able to overcome its own domestic everyday routine in due time, the West used to consider outward appearances (of mere verbal declarations in the law of posited texts) as actually effective and legally enforced normative contents of socialist law.[39] Therefore, it did not

[36] Since its classical European definition–in Weber, M.: *Rechtssoziologie* (1960) and Kelsen, H.: *Reine Rechtslehre* (1934)–, the very concept of legal formalism has acquired a function of constituting criterion also in American theoretical literature. Cf., e.g., Weinrib, A.: Legal Formalism. *The Yale Law Journal* 96 (1988), 949 et seq.; Shauer, F.: Formalism. *The Yale Law Journal* 97 (1989), 509 et seq.; McBarnet, D.–Whelan, C.: The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control. *Modern Law Review* 54 (1991), 848 et seq.; Summers, R.–Atiyah, P.: *Form and Substance in Anglo-American Law.* New Haven–London, 1987.

[37] Puchalska-Tych–Salter: Comparing Legal Cultures of Eastern Europe... *op. cit.* 183.

[38] *Ibid.*, para. 2, 164–174.

[39] For the stubborn dominance of such a non-realisation and non-awareness having done, with its blindness, serious harms to the peoples in the Central and Eastern European region until the change of regimes controlled by the West was effected, see, by Varga Cs.: *Transition to Rule of Law* On the Democratic Transformation in Hungary. Budapest, 1995. as well as Önmagát felemelő ember? Korunk racionalizmusának dilemmái [Man elevating himself? Dilemmas of rationalism in our age], in: Mezey, K. (ed.): *Sodródó emberiség* [Humankind adrift]. Budapest, [2000], 61–93; with a theoretical explanation, Rule of Law – At the Crossroads of Challenges. *Iustum, Aequum, Salutare* [Budapest] I (2005) 1–2, 73–88; and for western papers with the same realisation (as translated into Hungarian), also Varga, Cs. (ed.): *Kiáltás gyakorlatiasságért a jogállami átmenetben* [A call for practicality in the transition to rule of law]. Budapest, 1998.

believe the conceptual attempts either which criticised socialism upon the recognition of its nature as a culture built on sheer lying, i.e., on dictatorial deception and lip-service. Referring to such experience, among other scholars in the region, I repeatedly tried to call the attention of international professional fora to the facts that, firstly, in contrast to the worldview of the traditionally self-closing legal positivism, the genuine nature of law can only be identified outside itself; secondly, the formalism of modern law is only a part of the ideology of the legal profession of the West from the 18th to 20th centuries; consequently, thirdly, extending the scope of formalism as a criterion from the internal sphere of professional deontology to the overall ontology of the legal phenomenon will necessarily conceal the distinctive features of those arrangements that are based on other principles (e.g., on divine revelation in Islamic and Jewish law) or which refer to formalism (e.g., in socialisms) mostly out of mere political-ideological motives.[40] Or, as the same British comparatists propose (with reference to my own attempt),[41] the solution is "the multitextuality of the legal cultures" as opposed to the "de-contextualised picture" of 'comparative law', that is, to rely on "an entire contextual matrix in which the state law operates" (and, in it, also on the "micro-social level of grass-root lived-experience") within the "widely acknowledged [...] field of legal scholarship" of 'comparative legal cultures'; bearing the lesson in mind that

[40] See, by the author, as a clearly theoretical argument, Is Law a System of Enactments? in: Peczenik, A.–Lindahl, L.–van Roermund, B. (ed.): *Theory of Legal Science.* Dordrecht–Boston–Lancaster, 1984. 175–182.; for questions raised in socialism, Law as a Social Issue, in: Wronkowska, S.–Zielinski, M. (ed.): *Szkice z teorii prawa* i szczególowych nauk prawnych Professorowi Zygmuntowi Ziembinskiemu [Outlines for legal theory: a festschrift for Prof. Zygmunt Ziembinski]. Poznan, 1990. 239–255.; and as the pathology of Socialism and, therefore, also as a claim for laying the foundations for a specifically issue-sensitive legal ontology, Liberty, Equality, and the Conceptual Minimum of Legal Mediation, in: MacCormick, N.–Bankowski. Z. (ed.): *Enlightenment, Rights and Revolution* Essays in Legal and Social Philosophy. Aberdeen, 1989. ch. 11, 229–251. {reprinted in Varga, Cs. (ed.): *Marxian Legal Theory.* Aldershot–Hong Kong–Singapore–Sydney–Dartmouth–New York, 1993. 501–523.}. As to the modern law's formalism, seen as a proper professional deontology, that is, as the very form of the law's ontological existence (instead of the merely epistemological perspective of assessing it ideologically, or sheerly ideology-critically as a false consciousness, only motivated by the juristic world-concept ["*juristische Weltanschauung*"]), see, also Varga, Cs.: *The Place of Law in Lukács' World Concept.* Budapest, 1985 [reprint 1998]. 193, passim.

[41] *Comparative Legal Cultures. op. cit.* xvii.

"a living body of law is not a collection of doctrines, rules, terms and phrases. It is not a dictionary, but a culture; and it has to be approached as such."[42]

b) Convergence of Civil Law and Common Law

As to the convergence of European legal systems, a French-Canadian professor teaching at the *Sorbonne* in Paris gave voice to his doubts,[43] which later stirred up an aggressive yet all the poorer international debate,[44] in response to two

[42] Puchalska-Tych–Salter: Comparing Legal Cultures of Eastern Europe... *op. cit.* 183; 181, note 114; 182 and note 118, as well as 182, referring to Cotterrell, R.: The Concept of Legal Cultures, in: *Comparing Legal Cultures. op. cit.* 13–32. and Nelken, D.: Who can you Trust? The Future of Comparative Criminology [a lecture presented at the workshop entitled *Comparing Legal Cultures. op. cit.* {Macerata, May 18–20, 1994}], to *Comparative Legal Cultures.* xv–xxiv as well as Zedner, L.: In Pursuit of the Vernacular: Comparing Law and Order Discourse in England and Germany. *Social & Legal Studies* 4 (1995), 517–535. Cf. also Friedman, L.: Some Thoughts on Comparative Legal Culture, in: Clark, D. S. (ed.): *Comparative and Private International Law.* Essays in Honour of John Henry Merryman on his 70th Birthday. Berlin, 1990.

[43] Cf., by Legrand, P.: Europen Legal Systems... *op. cit.*, passim, as well as his Sens et non-sens d'un Code Civil Européen. *Revue internationale de Droit comparé* 48 (1996), 779 et seq., Against a European Civil Code. *Modern Law Review* 60 (1997), 44. et seq., and Le primat de la culture, in: P. de Varaeilles-Sommières (ed.): *Le droit privé européen.* Paris, 1998. 1–5. It is to be mentioned that Markesinis, B. S.–Why a Code is not the Best Way to Advance the Cause of European Legal Unity. *European Review of Private Law* (1997), 519–524–, acknowledging the unfeasibility of a common code yet wishing to substantiate the convergence, introduced the German law of contracts in English in a series of collective works, adapting the method of 19th-century German pandectism–"first deconstruct and then reconstruct"–to English conditions. This laudable initiative was, however, qualified by its critic–Legrand, P.: Are Civilians Educable? *Legal Studies* 18 (1998), 216 et seq., particularly at 227, note 63–as the "trivialisation" of German law. Markesinis, in return, gave way to a rejoinder of a personal tone in his Studying Judicial Decisions in the Common Law and the Civil Law: A Good Way of Discovering Some of the Most Interesting Similarities and Differences that Exist between these Legal Families, in: van Hoecke, M.–Ost, F. (ed.): *The Harmonisation of European Private Law.* Oxford–Portland–Oregon, 2000. 117–134, especially 133.

[44] Cf., just for one example, van Hoecke, M.: The Harmonisation of Private Law in Europe: Some Misunderstandings, in: *The Harmonisation... op. cit.* 1–20 [relying rather idealistically solely on measures of education and socialisation] and, especially, Chamboredon, A.: The Debate on a European Civil Code: For an »Open Texture«, in: *ibid.*, 63–99 [giving a post-modern expression to ancient wisdoms gained from the European experience of codification by combining legislatorial moderation, as well as from raising awareness of the use of flexible concepts and systematic interpretation]. All this was accompanied by such overtones in the overall debate that G. Samuel–English Private Law in the Context of the Codes, in: *ibid.*, 47–felt prompted to state: "Weak theorising,

resolutions taken by the European Parliament on the commencement of the preparation, respectively actual drafting, of a Common European Code of Private Law,[45] about which enthusiastic reports were at once released, concluding from the signs of "converging" and "a continual *rapprochement*" that "a new *ius commune* is thus in the making".[46]

What are, then, these daring allegations? The description of living complexes in terms of mere rules results in "thin description" at the most, excluding "thick description" the more so as the rules are–just as the concepts–only the outcome of some feasible mental representation.[47] Thus, any exclusive reliance upon or over-emphasis of them may only contribute to the dissolution of existing interrelations by atomising and fragmenting their organic components.[48] Since in case of any law "you have to know where it comes from and what its image of itself is",[49] we can only conclude that there is a difference between Civil Law and Common Law, which is both irreducible and irresolvable at the same

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simplistic metaphors and the arrogant dismissal of opponents' arguments do Europe no favours."

[45] 'European Parliament's Resolution on Action to Bring into Line the Private Law of the Member States' *Official Journal* C158/400 (26 May 1989) and 'European Parliament's Resolution on the Harmonisation of Certain Sectors of the Private Law of the Member States' *Official Journal* C205/518 (6 May 1994).

[46] de Groot, G.-R.: European Education in the 21st Century, in: De Witte, B.–Forder, C. (ed.): *The Common Law of Europe and the Future of Legal Education.* Deventer, 1992, 11; Glenn, H. P.: La civilisation de la common law. *Revue internationale de Droit comparé* 45 (1993), 567; as well as Markesinis, B. S.: Bridging Legal Cultures. *Israel Law Review* 27 (1993), 382.

[47] Ryle, G.: The Thinking of Thoughts: What is »Le Penseur« Doing?, in: his *Collected Papers* II: Collected Essays, 1929–1968. London, 1971. 480, as well as Stengers, I.: Le pouvoir des concepts, in: Stengers, I.–Schlenger, J.: *Les concepts scientifiques* Invention et pouvoir. Paris, 1991. 63–64. It is to be remarked that the "*praesumptio similitudinis*", proposed by Zweigert, K.–Kötz, H. in their *An Introduction to Comparative Law.* 2nd rev. ed. Oxford–New York, 1992. 36, according to which even radical differences in conceptualisation may result in similar functional solutions in practice–as once expressedly observed by Zweigert, K. in his Solutions identiques par des voies différentes (Quelques observations en matières de droit comparé), *Revue internationale de Droit comparé* XVIII (1966), 5–18–, does not offer a refuge, because it indicates exactly the unsuitability and the barriers of text-formalism.

[48] "We have put into people's heads that society is a creature of abstract thought when it is constituted by habits and customs. When you submit habits and customs to the grindstone of reason, you pulverize ways of life based on longstanding traditions and reduce human beings to the state of anonymous and interchangeable atoms." Lévy-Strauss, C.–Eribon, D.: *De près et de loin.* Paris, 1988. 165.

[49] Merryman, J.: in *The American Journal of Comparative Law* 35 (1987), 441.

time. For it is made up of the difference between mentalities and worldviews with their implied presuppositions and attitudes, aspirations and empathies, which all constitute the deep structure and local rationality of thinking in terms of all the above and serve as the indispensable key to their cognition. This is why the classic of studies in Roman law once spoke (as if of the Hegelian *Volksgeist*) something of a secret intellectuality,[50] recalling the original idea of Montesquieu: "It is not the body of laws that I am looking for, but their soul!".[51]

4. Concluding Remarks

With this, we have returned to the self-closure of 'comparative law'. Although the programmatic methodological requirement according to which "the comparativist must eradicate the preconceptions of his native legal system"[52] is well known, actually it is the Western concepts of order, ethos and rationality that are usually asserted as universal claims under the veil of "a non-transparent and taken-for-granted Western ideology of value-free scientific approach to research".[53] This is what manifests itself in the global sanctioning of the Western ideal of law[54] and especially in the service of current Atlantic and European endeavours which deliberately restrict the chances for survival of other ideals of order and legal arrangements,[55] and also in the competition

[50] Pringsheim, F.: Inner Relationship between English and Roman Law. *Cambridge Law Journal* (1933–1935), 348.

[51] Montesquieu: Dossier de l'*Esprit des Lois.* In: Caillois, R. (ed.): *Oeuvres complètes* II. Paris, 1951. 1025. Legrand: European Legal Systems Are not Converging. *op. cit.* 55 et seq. explains in more detail the impossibility of convergence by the example of the radical differences both in legal reasoning and systematisation, and the use of rules and the role of facts, as well as the in meaning of entitlements and the varying presence of the past.

[52] Zweigert–Kötz: *An Introduction to Comparative Law. op. cit.* 32.

[53] Puchalska-Tych–Salter: Comparing Legal Cultures of Eastern Europe... *op. cit.* 160.

[54] For a stand taken by legal philosophy, see, e.g., Surya Prakash Sinha: Non-universality of Law. *Archiv für Rechts- und Sozialphilosophie* 81 (1995). 185–214. According to his radical conclusion, "law itself is parochial to Western civilisation", therefore "transforming non-legal cultures into legal societies", as forced by the majority of international organisations, is both harmful (as it evacuates cultural patterns) and subversive for the larger part of the world (209 and 211).

[55] One of the fields of such fights today is the question of the universalisability, without a cultural loss, of human rights, taken as an ideal and as a store of instruments enacted by Atlantic documents in accordance with the Western legal ideal. See, e.g., Pollis, A.–Schwab, P. (ed.): *Human Rights* Cultures and Ideological Perspectives. New York, 1979.; Surya Prakash Sinha: Human Rights: A Non-western Viewpoint. *Archiv für Rechts-*

for patterning the future European law through the re-writing of its past history[56]– in short, which manifests itself in all preferences called ethnocentrism in

und Sozialphilosophie 67 (1981), 76 et seq.; Hassan, R.: On Human Rights and the Qur'anic Experience, and Mitra, K.: Human Rights in Hinduism. *Journal of Ecumenical Studies* 19 (1982), 51–65, resp. 77–84; Hjärpe, J.: The Contemporary Debate in the Muslim World on the Definition of »Human Rights«. In: Ferdinand, K.–Mozaffari, M. (ed.): *Islam* State and Society. London, 1988. 26–38.; Welsh, C. Jr.–Leary, V. (ed.): *Asian Perspectives on Human Rights.* Boulder, 1990.; Preis, A.-B. S.: Human Rights as Cultural Practice: An Anthropological Critique. *Human Rights Quarterly* 18 (1996), 286–315.; Dembour, M.-B.: Human Rights Talk and Anthropological Ambivalence: The Particular Contexts of Universal Claims. In: Harris, O. (ed.): *Inside and Outside the Law* Anthropological Studies of Authority and Ambiguity. New York–London, 1996. ch. 2, 19–40; Luf, G.: Peace and Human Rights as Seen by the Churches. In: Bsteh, A. (ed.): *Peace for Humanity* Principles, Problems and Perspectives of the Future as Seen by Muslims and Christians. New Delhi, 1996. 143–157 and, for the debate, 158–177.; Lindholt, L.: *Questioning the Universality of Human Rights* The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique. Aldershot–Burlington USA–Singapore–Sydney, 1997.; Marfording, A.: Cultural Relativism and the Construction of Culture: An Examination of Japan. *Human Rights Quarterly* 19 (1997) 3, 431–448.; Perry, M. J.: Are Human Rights Universal? The Relativist Challenge and Related Matters. *Human Rights Quarterly* 19 (August 1997), 461–509.; Boaventura de Sousa Santos: Toward a Multicultural Conception of Human Rights. *Sociologia del Diritto* XXIV (1997), 27–45.; Hjärpe, J.: *Some Problems in the Meeting between European and Islamic Legal Tradition* Examples from the Human Rights Discussion [multipl.]. [Lund:] [n.y.] 21. The set of questions naturally involves interference through exerting political or economic pressure or via so-called humanitarian aid. For Central and Eastern Europe, see the titles in note 39 and, for an example distant but touching upon so called "Westernisation strategies", Wai Man Sin–Chu Yiu Wai: Whose Rule of Law? Rethinking (Post-)Colonial Legal Culture in Hong Kong. *Social & Legal Studies* 7 (1998). 147–169.

[56] After remarkable historical foundation–above all, by Koschaker, P.: *Europa und das römische Recht.* München, 1947. and Wieacker, F.: *Privatrechtsgeschichte der Neuzeit* unter besonderer Berücksichtigung der deutschen Entwicklung. Göttingen–Vandenhoeck–Ruprecht, 1952.–and serials–first of all, Coing, H. (hrsg.): *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte* München, 1973–1988. and *Ius commune* I–(1973–)–, accompanied by theoretical overviews–e.g., Wieacker, J.: Foundations of European Legal Culture. *The American Journal of Comparative Law* 38 (1990), 1–29., Arnaud, A.-J.: *Pour une pensée juridique européenne.* Paris, 1991., as well as Gessner, V.–Hoeland, A.–Varga, Cs.: *European Legal Cultures.* Aldershot–Brookfield USA–Singapore–Sydney, 1996., a discipline called 'European legal history' was born. For its outlines, see, e.g., Schulze, R. (hrsg.): *Europäische Rechts- und Verfassungsgeschichte* Ergebnisse und Perspektiven der Forschung. Berlin, 1991. and Schulze, R.: European Legal History: A New Field of Research in Germany. *The Journal of Legal History* 13 (1992). 270–295. According to critics–e.g., Osler, D. J.: The Myth of European Legal History.

scholarship, cultural imperialism in politics, and neo-colonialism in practice. In fact, in the absence of any theoretically elaborated or methodologically founded opposing force, all such impacts have recently been marshalled mostly under the banner of 'comparative law' or at least with its active support.

Nevertheless, we have to bear in mind that no kind of formalism can serve as an excuse for any restrictions on human entirety and cultural diversity, as well as on the professional responsibility to be taken for these.[57] Accordingly, in our approach to legal institutions we also have to recognise individual and collective accomplishments in all human attempts at creating order, and provided they have produced values, we have to appreciate and try to preserve these as such.[58]

Rechtshistorisches Journal 16, 393–410–, all this endeavour dedicated to erecting a 'European legal history' has only been conceived as to re-write history according to present-day interests, so as to conclude, by justifying the alleged past existence of a *ius commune* by the one-time allegedly dominant intellectual performance of today's major European powers, to the advent of a *ius commune* in the European Union with a hegemonic role to be played in its framing by a German–Dutch–French bloc. For the pitfalls (with underlying methodological biases) of such a new Euro-historicism, see, among others, Anton Schuurman, A.: Globalisering en geschiedenis. *Tijdschrift voor sociale geschiedenis* 27 (2001), 385–410.; Borgolte, M.: Vor dem Ende der Nationalgeschichten? Chancen und Hindernisse für eine Geschichte Europas im Mittelalter. *Historische Zeitschrift* (2001), 561–596.; and Hoenicke Moore, M E.: Euro-Medievalism: Modern Europe and the Medieval Past. *Collegium* (Summer 2002), 67–79.

[57] Cf. Zacher, H. F. (ed.): *Democracy* Some Acute Questions [The Proceedings of the Fourth Plenary Session of the Pontifical Academy of Social Sciences, 22–25 April 1998] Vatican City, 1999. and Zacher, H. F. (ed.): *Democracy* Reality and Responsability [The Proceedigns of the Sixth Plenary Session of the Pontifical Academy of Social Sciences, 23–26 February 2000], Vatican City, 2001.

[58] For a number of further related questions, cf. Krawietz, W.–Varga, Cs. (ed.): *On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe.* Berlin, [2003]. *Rechtstheorie* 33 (2002) 2–4.

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CLAYTON G. MACKENZIE*

Hong Kong's Copyright Laws: Recent Developments and Dilemmas

Abstract. In January 2005 a Hong Kong resident was arrested and charged with distributing three Hollywood movies over the internet using BitTorrent software. At his trial, the prosecution argued that the defendant's actions amounted to the criminal offence of "distribution" under section 118 (1) (f) of the Copyright Ordinance. The defence countered that defendant's actions in uploading the files to his computer did not constitute distribution and amounted to no more than "making available" copyright materials–which was covered under civil provisions in section 26 of the same Ordinance. The defendant was found guilty and became the world's first BitTorrent user to be criminally convicted of piracy. The case has opened up strong debate in Hong Kong, with moves afoot to introduce a new raft of copyright legislation.

Keywords: copyright, technology, online, piracy, Hong Kong, Asia

In the last days of British rule, Governor Chris Patton signed into law a raft of new legislation, including the Copyright Ordinance which came into effect on 30 June 1997,[1] the day before Hong Kong returned to Chinese sovereignty. The ordinance proved a useful tool for the new administration and a number of prosecutions were pursued under its ambit–but it had limitations. For example, a company that manufactured vehicle components could buy a computer program licensed for use in one computer to organize its inventory. But what if the company then installed the same software on dozens of other computers used by its employees? Under the Copyright Ordinance it was unclear whether such action would incur criminal liability since the business of the company was not to sell computer software but to sell vehicle components. Using the same principle, if a restaurant or bar played an illegal music recording during the course of its business it would most likely not be criminally liable. Amendments were made to the Copyright Ordinance in an on-going effort to preserve

* LLM (London), PhD (Glasgow), Director of the Double Degree Programme, Faculty of Arts, Hong Kong Baptist University, Kowloon Tong, Hong Kong, Tel: ++ 852 34117152, Fax: ++852 3411 7895
E-mail: mackenzi@hkbu.edu.hk.

[1] Copyright Ordinance (Cap 528), Hong Kong (2006).

its relevance and applicability but such has been the pace of technological advance in the last decade that copyright legislation in Hong Kong (and, it must be said, in many jurisdictions outside Hong Kong) has risked falling behind the realities of the digital present.

While the *Copyright Ordinance* dealt reasonably adequately with the copying and bootlegging of tangible copyright entities, such as books, newspapers, CDs, VCDs and DVDs, one area where its provisions seemed particularly vulnerable was on-line piracy. The *Ordinance* was drafted at a time when file sharing was a little known and little feared phenomenon. When file sharing first came into digital vogue in 2000, annual retail record sales in Hong Kong topped $913 million. By 2004 sales had declined to $219 million–a fall of almost 75% in five years. Multimedia recording industries raised a chorus of alarm but the government, smarting from massive public protests in 2003 and a humiliating climb down on its draconian anti-subversion laws, was anxious to avoid any kind of new legislative foray that might smack of heavy handedness. Instead, enforcement agencies insisted that existing legislation was sufficient but proposed closer collaboration with the film and music industries in pursuing on-line offenders. In 2004 the Intellectual Property Investigation Bureau of the Hong Kong Customs and Excise Department proposed a taskforce, comprising Bureau and industry representatives, to tackle the problem of on-line piracy. In December of the same year the taskforce met for the first time. Within a month, its work had resulted in the arrest of Chan Nai Ming, a thirty-eight year old unemployed resident of the Tuen Mun area.

The "Big Crook" Case (2005)[2]

It was alleged that Chan had attempted to distribute three Hollywood movies via the internet using BitTorrent peer-to-peer file sharing technology. He had uploaded the files on to his computer and posted their availability on a popular BitTorrent movie newsgroup website. Perhaps unwisely, Chan had used the internet alias "Big Crook" and his posting was spotted by a Customs officer.[3] In October 2005, Chan was convicted of attempting to distribute copyright material without the permission of the licensor and sentenced to three months

[2] "Big Crook" was the internet moniker of Chan Nai Ming whose case was heard in the Tuen Mun Court (HKSAR v Chan Nai Ming (陳乃明) TMCC 1268/2005) and his subsequent appeal in the Court of First Instance (HKSAR v Chan Nai Ming (陳乃明) HCMA 1221/2005).

[3] *Ibid.*

jail, though released on bail pending appeal. He had become the world's first BitTorrent user to be convicted of piracy. In December 2006 the defendant's appeal was dismissed by the Court of Appeal and he was sent to prison.

Chan Nai Ming's defense counsel argued that making copyright protected material available on a computer using BitTorrent software did not amount to "distribution." Chan had at most "made available" the movies in question, which, it was submitted, was different to distributing them. The act of "making available" copies of copyrighted material is covered under Section 26 of the *Copyright Ordinance* but it is subject to civil and not criminal liabilities.

> (1) The making available of copies of the work to the public is an act restricted by copyright in every description of copyright work.
>
> (2) Reference in this Part to the making available of copies of a work in the public are to the making available of copies of the work, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the work from a place and at a time individually chosen by them (such as the making available of copies of works through the service commonly known as the INTERNET).[4]

Section 26 interprets the act of "making available" copyright material a relatively passive action in which those copying from the source do so "from a place and at a time individually chosen by them." The Internet is explicitly identified as an example of a context where the act of "making available" copyrighted materials could take place. Had the copyright holders pursued Chan under these civil provisions they could have sought damages from him for loss of copyright earnings, obliged him to remove the files from his computer, and required him to undertake to desist from such activities in the future.

Clearly, though, there were greater issues at stake and the State, with the full backing of the industry, decided to pursue the case as a criminal prosecution. In order to do so, it had to be argued successfully that Chan's actions amounted to distribution which is covered under Section 118 of the *Ordinance* and which carries with it criminal penalties (a maximum four-year jail term):

1) A person commits an offence if he, without the license of the copyright owner –
   (a) makes for sale or hire;
   (b) imports into Hong Kong otherwise than for his private and domestic use;

[4] *Copyright Ordinance*, Section 26.

(c) exports from Hong Kong otherwise than for his private and domestic use;
(d) possesses for the purpose of, in the course of, or in connection with, any trade or business with a view to committing any act infringing the copyright; (Amended 64 of 2000 s. 7)
(e) for the purpose of, in the course of, or in connection with, any trade or business–(Amended 64 of 2000 s. 7)
    (i) sells or lets for hire;
    (ii) offers or exposes for sale or hire;
    (iii) exhibits in public; or
    (iv) distributes; or
(f) distributes (otherwise than for the purpose of, in the course of, or in connection with, any trade or business) to such an extent as to affect prejudicially the owner of the copyright, (Amended 64 of 2000 s.7) an infringing copy of a copyright work.[5]

Clearly Chan was not liable under sections 1(a)–(e), since his seed files were not uploaded with any trade or business intent, and were offered neither for sale nor for hire. His criminal culpability rested entirely on section 1(f) and on the definition of "distributes." Unfortunately, the *Copyright Ordinance* does not offer a definition of the term.

In order to adjudicate in some working sense the difference between making something available and distributing it, we need to understand some of the technical aspects of the technology that Chan was using. The nature of BitTorrent, or peer-to-peer (P2P) technology is complex and, as I shall argue, blurs the distinction between uploader and downloader. A typical scenario would involve a peer (the seeder) uploading a movie on to his computer with a "torrent" extension name (the seed file). Using hashing algorithms, the seeder will already have broken down the movie into smaller pieces. The seeder will then advertise the .torrent file on a website where another computer (the "tracker" server) will coordinate file distribution. Say, for example, five visitors to the site (a so-called "swarm" in BitTorrent-speak) decide to obtain a copy of the movie. Under the coordination of the tracker server, each visitor (or "peer") will be directed to the seeder computer and begin downloading the movie, bit by bit. However, the peers will also be directed to each other's computers. They may then gather the component bits of the movie not only from the seeder computer but also from other swarm computers which may be at varying stages

[5] *Copyright Ordinance*, Section 118.

in the same downloading process. Curiously, then, the more people downloading the same movie through BitTorrent technology, the faster the downloading process becomes, since the more computers that become involved the greater the number of downloading routes that become available to a given peer computer. This runs quite contrary to normative computing experience where, typically, the more people who wish to download a file, the longer it takes.

There are two crucial issues in the BitTorrent scenario. Firstly, the seeder computer needs to make itself available (that is, it needs to be on-line) but it has no control over which users (if any) access its information. In other words, whether its information is distributed or not is outside the control of the seeder. Secondly, such is the nature of BitTorrent software that each of the peer computers at any given moment may be either downloading or uploading information–they may be downloading component bits from the seeder or other peer computers but, since other peer computers may be downloading from them as well, they are also by definition uploading for the benefit of others (effectively acting as proxy "seeders" themselves).

The magistrate in the Tuen Mun Court where Chan was first convicted ruled that (a) by keeping his computer on-line, and therefore making it possible for peers to download the files, and (b) by creating inlay images of the film sleeves on his computer, the defendant had actively distributed copyright materials without permission.

> This was not merely "making available" the BitTorrent files. These were positive acts by the defendant, leading to the distribution of the data. He intended that result. In no way can the defendant's involvement in the downloading of this material be properly described as passive. The fact that the recipients of the packets of data, originating from the defendant's computer, might have received it by indirect routes does not alter the nature of the defendant's act of distribution.[6]

This interpretation of Chan's actions allows a lot of latitude for the definition of the term "distribution." To "distribute" something suggests an active agency and, arguably, the act of distribution in this case was initiated by BitTorrent peer users who had connected with the seeder and other computers in the swarm–or, indeed, the tracker computer itself. From a purely terminological point of view, Chan's actions seem to be accommodated more accurately by the description "making available" than by the term "distributing." True enough,

[6] Magistrate Colin Mackintosh, HKSAR v Chan Nai Ming (陳乃明) (2005): TMCC 1268/2005. Paragraph 34.

without Chan's initiating actions, the distribution could not have taken place–but could his actions be captured more accurately by the phrase "making available" (Section 26 of the *Ordinance*, which explicitly refers to internet usage) and should the remedy have been civil rather than criminal?

Chan's conviction reflected a growing and understandable frustration felt by enforcement agencies, the recording industry and perhaps the judiciary itself. There was some speculation that the ruling would be overturned on appeal. However, on 12 December 2006 the Court of Appeal dismissed Chan's appeal, with Justice Beeson noting in her judgment that Hong Kong's laws had to protect the city's international standing. The *Ordinance*, she affirmed, was designed "to help maintain Hong Kong's important and hard-won position as a responsible member of the worldwide trading community" (HKSAR v Chan Nai Ming (陳乃明), HCMA 1221/2005 (paragraph 79).[7] This suggested a decision based as much on territorial policy as on legal principles–which is an acceptable position for a higher court to take, of course, but how much more persuasive it would have appeared had it been constructed on firmer legal footings. At the time of writing, Chan's legal team was preparing a last ditch petition to Hong Kong's highest court, the Court of Final Appeal.

In the weeks following Chan's conviction in October 2005, the number of seed files uploaded in Hong Kong fell by 80% according to official figures. The government took this to signify that the criminal proceedings against "Big Crook" had paid good dividends and the digital industries that had suffered most from piracy were unanimous in their approval of the outcome. Further high profile prosecutions of low profile alleged offenders followed. In March 2006 seven major music companies launched an action against a fifty-four year old man from the working class neighborhood of Sheung Shui for allegedly uploading, downloading and storing copyright protected music. The companies are demanding undisclosed damages from the man–he argues that he does not even know how to turn on the home's computer and that, if there has been any wrong doing, most likely his teenage daughters were the culprits. Later in the same week, record companies filed a writ in the High Court accusing a housewife from the middle class neighborhood of Laguna City of uploading, downloading and storing copyrighted music on her computer. Both cases are ongoing.

In May 2006, following complaints from industry copyright owners, Customs officers arrested a 16 year old school boy in Sau Mau Ping, Kowloon, and accused him of configuring his computer as a server for the distribution of music and film files. It was the first time that anyone had been arrested in the

[7] HKSAR v Chan Nai Ming (陳乃明) (2005). *op. cit.*

territory for distributing copyright digital materials through a website server–and though this was not a BitTorrent case there could be a hint that authorities may now be willing to test in the courts the criminal liability of a "tracker" server. The teenager was sentenced to a one year probation order in January 2007. Again in May 2006, the Film Industry Response Group, an industry group formed specifically to tackle the problem of movie piracy, obtained a court order requiring four internet service providers to reveal the identities of 42 account holders whose computers had allegedly been used to pirate copyright movies using BitTorrent software. Letters sent to the 42 individuals demanded that they undertake not to download movies again and required each to pay HK$23,000 in compensation–a figure based on cases in the United States were compensation ran to US$3,000. If the individuals do not comply, the letters threaten to take them to court and prosecute them under the *Copyright Ordinance*. It seems very possible, therefore, that the civil liability of BitTorrent peer users will be tested in the courts in the near future.

New Legal Proposals

Following consultations with the public and the recording industry, in 2006 the government published a consultative document titled Copyright Protection in the Digital Environment (CPDE) which called for public discussion of wide-ranging changes to the copyright laws. Public consultation will end in April 2007 after which time the Government will set about drafting and enacting relevant legislation. The new proposals are loosely modeled on the US Digital Millennium Copyright Act 1998 (DMCA)[8] which criminalized the production and the dissemination of copyright material and, in particular, increased penalties for Internet infringements.

However, the proposed Hong Kong legislation differs conspicuously in two important respects from the DMCA. Firstly, under Chapter 1 of the CPDE proposals, the matter of criminalizing the downloading of copyright materials is raised. In mooting this possibility, the CPDE shows clearly its awareness of the frustration felt by big business:

> ... copyright owners from different industries (including the music, movie, computer software, publishing industries, etc.) claim that rampant Internet infringement activities have seriously hampered their development and their loss could hardly be compensated by damages awarded as a result of

[8] Digital Millennium Copyright Act (1998). United States 112 Stat. 2860.

> individual civil actions. Some suggest that unauthorized downloading activities should constitute [a] criminal offence.[9]

If, indeed, downloading *per se* becomes a criminal activity under Hong Kong law this would constitute a significant departure from international practices. In Singapore downloading of copyright materials attracts criminal liability if it is conducted on a significant scale or if it is for commercial gain; in the United States downloading may be regarded as a criminal activity if it is conducted for commercial gain or if the retail value of the downloaded materials exceeds US$1,000. However in jurisdictions such as the United Kingdom, Australia and Canada–countries to which Hong Kong has traditionally looked for its legal models–the unauthorized downloading of copyright materials incurs only civil liability.

Critics of Hong Kong's post-1997 governance regularly accuse it of pandering to the whims of big business, and of doing so at the expense of the man in the street, the individual. It is true that the CPDE is a consultation document but while it articulates the various possibilities for criminalizing downloading, it fails to articulate as fulsomely the case for maintaining unauthorized downloading as a civil offence. The inference of the document is not whether downloading should be criminalized or kept as a civil liability but, rather, to what extent it should be criminalized.

Secondly, while the DMCA has been criticized in the US for jeopardizing the principle of "fair use" some academic commentators outside the US have regarded the provisions as comparatively flexible.[10] In contrast, the Hong Kong proposals for "fair use" are extremely narrow. The term is used only once in the body of the CPDE text [chapter 6(9)] and there in relation to the somewhat esoteric issue of the temporary reproduction of copyright works (as, for example, in the creation of a temporary buffer copy in the course of digital streaming). What is absent from the document is a sustained awareness of anyone's point of view apart from that of the copyright holder. Yet, in truth, there is another equally important stakeholder in this process and one whose

[9] Copyright Protection in the Digital Environment (1.4) (2006), Government Printer, Hong Kong.

[10] Those who have vigorously opposed the DMCA's provisions include digital lobby groups such as the Electronic Frontier Foundation (see http://www.eff.org/IP/DMCA/) and the Anti-DMCA Organization (see http://www.anti-dmca.org/index.html). Michael Pendleton, Associate Director of Chinese University of Hong Kong's School of Law has suggested that, in comparison to Hong Kong's provisions, the US has a "wide ranging 'fair use' defence" (*South China Morning Post*, Monday 22 January 2007).

views ought to be taken into account–the individual user himself or herself. From the consumer's perspective, it might well be argued that Hong Kong's film and music industries have been too slow in providing sufficient digital content for legal downloading purposes. The territory's traditional predilection for multimedia gadgetry has left end-users frustrated by the paucity of legal materials available for download. For its part, the industry feels that uploading its video and music catalogues on to the internet in neat digital packaging presents insuperable security obstacles. We therefore find ourselves in a situation where consumers want greater variety and choice in their download menus but digital industries are afraid to open the larder doors.

Conclusion

Hong Kong's *Basic Law*, which came into effect on 1 July 1997, contains specific provisions for the protection of intellectual property. Article 139 affirms that the "The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on science and technology and protect by law achievements in scientific and technological research, patents, discoveries and inventions." And Article 140 undertakes to "protect by law the achievements and the lawful rights and interests of authors in their literary and artistic creation." Yet, translating intent into action has not been easy and in the ten years following the return to Chinese rule the question of intellectual property rights has loomed large–not least in the spheres of Hong Kong's film and recording industries which have suffered heavily from piracy. A point has been reached where Hong Kong's digital businesses and the Government itself now believe that only by enacting a fiercer set of copyright laws can the territory's creative industries be safeguarded and allowed to flourish.

No-one can argue it is just and fair that intellectual property should be protected but the supposition that a combination of criminal laws and court actions is the best way to change people's behavior and nurture creativity may be misplaced. Alice Lee,[11] a prominent Hong Kong Law professor, has warned the Government to think carefully about future legislation, suggesting that "overzealous attempts to protect copyright could actually stifle creativity by restricting the flow of information."[12] And Michael Geist,[13] a Canadian authority

[11] Lee, Alice (20 December 2006): Interview. The Standard. Hong Kong, China.

[12] Interviewed in *The Standard*, Wednesday 20 December 2006.

[13] Geist, Michael (22 January 2007): Interview. South China Morning Post. Hong Kong, China.

on intellectual property laws, has noted that even the US *Digital Millennium Copyright Act* is now being "viewed by many as an extreme example of implementing the WIPO [World Intellectual Property Organization] Internet Treaties. Many countries–including Canada and New Zealand–have begun to distance themselves from the DMCA-style approach."[14] Indeed, a softer line on the policing of intellectual property, one that gives consumers greater access to, and flexibility in the use of, digital materials, may well pay dividends if it can be combined with alternative mechanisms for collecting copyright revenues.

[14] Interviewed in the *South China Morning Post*, Monday 22 January 2007.

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MÁTYÁS BÓDIG*

Legal Interpretation, Intentionalism, and the Authority of Law**

Abstract. The essay reflects upon the debate over intentionalism about statutory interpretation, and argues for a moderate version of intentionalism. It argues that the debate over intentionalism cannot be sorted out without establishing a viable conception of legislative authority. The outlines of such a conception are put forward by throwing some light on the concept of "representational authority". The essay also argues that the problem of legal interpretation touches upon issues of sovereignty. It implies that some important issues of the normative theory of legal interpretation are linked to substantive political philosophical problems.

Keywords: interpretation, normative theories of legal interpretation, intentionalism, representational authority, sovereignty union

Introduction

The following essay is a contribution to the age-old debate among jurists over the proper role of *legislative intentions* in statutory interpretation. The debate plays out in legal theory as the controversy between intentionalists and non-intentionalists. *Intentionalists* claim that legislative intentions play an important role in statutory interpretation. *Non-intentionalists*, on the other hand, insist that legislative intentions cannot have that role: intentionalist methods are forbidden in the legal practice.[1] My analysis will present an incomplete argument for a version of intentionalism about statutory interpretation. The argument is based

* Research Fellow, Institute for Legal Studies, H-1014, Budapest, Országház u. 30. Hungary.
E-mail: mbodig@mailbox.hu

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[1] See Moore, M.: Interpreting Interpretation. In: Marmor, A. (ed.): *Law and Interpretation: Essays in Legal Philosophy*. Oxford, 1995. 24.

on certain conceptual considerations concerning the authority of statutory provisions.

I deliberately employ here a rather broad and weak formulation of intentionalism that does not refer to one particular interpretive method.[2] Intentionalism, as I depict it here, can take several forms. One option is linking the intentionalist position to the well-known view that textual interpretation is about retrieving *authorial intentions*, and regarding legislators as the authors of statutes. Another option is the claim that, although textual interpretation is not necessarily about retrieving intentions, there is something special about legal interpretation that vindicates intentionalist interpretive strategies. And an intentionalist can also claim that intentionalist interpretive strategies should play a vital but only partial role in legal interpretation.

As the preliminary remarks should make it obvious, the present essay concentrates on the problems of *normative theories of legal interpretation* that engage with norms that determine what qualifies as a successful legal interpretation or as a justifiable interpretive strategy. For this reason, I do not undertake to defend here any descriptive theory of legal interpretation. However, each normative theory of legal interpretation presupposes something that belongs to the realm of descriptive theories: a plausible account of the process and the constitutive features of legal interpretation. Without such an account in its background, a normative theory of legal interpretations is totally irrelevant. For this reason, it may be useful to reveal the main conceptual points about interpretation and legal interpretation that I will rely on. As this is not the task of the present analysis, I do not provide arguments for them, but I hope that they are not too controversial, and will not scare off my potential readers.

First, a few words on interpretation itself. When we talk about interpretation, we tend to treat textual interpretation as the central case. As the subject of my paper is statutory interpretation, this is not at all against my intentions. However, for philosophical reasons, it is better to settle for a more general definition. Interpretation is one of the activities directed towards *understanding meaning*.[3] Of course, its theoretical problem is not identical with that of understanding meaning: interpretation actually presupposes the ability of understanding

[2] In light of the wide variety of the uses of the "argument from intention", it would seem rather odd to talk about one particular intentionalist interpretive method. Cf. MacCormick, N.–Summers, R. S.: Interpretation and Justification. In: MacCormick, N.–Summers, R. S. (eds.): *Interpreting Statutes: A Comparative Study*. Aldershot, 1991. 522–525.

[3] See Moore: *op. cit.* 2.

meaning.[4] Interpretation is required when understanding meaning is problematic in a distinctive way: having access to the pertinent meanings requires some effort that is within the scope of our linguistic skills.[5] Interpretation should be taken as a process that substitutes one linguistic expression for another.[6] When we effortlessly understand the meaning, which is very often the case,[7] interpretation is not necessary. When the meaning to be understood transcends our linguistic skills (e.g. when someone speaks to us in a language that we are not familiar with), interpretation cannot be successful.

As to legal interpretation, the crucial preliminary point is that I take it to be strongly connected to legal reasoning. The theoretical problem of legal interpretation is a part of the broader theoretical problem of legal reasoning. The link between the two problems is established by the fact that, in modern legal systems, legal reasoning normally has to rely on reasons that are drawn from recognized sources. It is also characteristic of modern legal systems that the law authenticated by the recognised sources is incorporated in written legal documents ("legal texts"). Legal reasoning often has to rely on textual interpretation to have access to the relevant legal reasons. Legal reasoning must be capable of providing a proper reading of legal texts. It is also important that when legal theorists or lawyers speak of legal interpretation they tend to think of a specific interpretive activity that figures in the process of making particular legal decisions, and I will be no exception. Although a whole series of interesting theoretical problems arise from other activities that can also be associated with interpreting law (like following or violating the law, or designing new laws), the present analysis will ignore them.

Of course, there are several kinds of legal texts, and they are all proper objects of legal interpretation. One can interpret judicial or administrative decisions or even international treaties. But as I have chosen the controversy

[4] See Marmor, A.: *Interpretation and Legal Theory*. Oxford, 1992. 21. This implies the rejection of the view that the theoretical problem of interpretation, at least *sensu largo*, covers the whole problem of understanding. For such a view, see Bankowski, Z.–MacCormick, N.–Summers, R. S.–Wroblewski, J.: Method and Methodology. In: MacCormick–Summers (eds.): *Interpreting Statutes...op. cit.* 12.

[5] Dummett, M.: A Nice Derangement of Epitaphs: Some Comments on Davidson and Hacking. In: LePore, E. (ed.): *Truth and Interpretation: Perspectives on the Philosophy of Donald Davidson*. Oxford, 1986. 463.

[6] Of course, making this point has a Wittgensteinian pedigree (although the relevant analysis by Wittgenstein addresses significantly different issues). See Wittgenstein, L.: *Philosophical Investigations*. Oxford, 1958, s. 201. See further Dummett: *op. cit.* 464.

[7] Cf. Hacking, I.: The Parody of Conversation. In: LePore (ed.): *Truth and Interpretation... op. cit.* 451. See further Dummett: *op. cit.* 464.

about intentionalism as the subject of the present paper, I will focus on statutory interpretation. I use the terms "legal interpretation" and "statutory inter Allan pretation" interchangeably below.

There is a crucial methodological point that I will rely on throughout this essay but that I will not try to justify in detail: a normative theory of legal interpretation cannot be some *general theory of interpretation* applied to law. The character of statutory interpretation is very much determined by its function: it serves a practical function in being part of a practice that seeks to provide practical guidance. This function has a lot to do with the way we think about the role of the legislature and the judiciary in the life of our society, that is, with issues concerning the proper allocation of institutionalized public authority in a political society. It cannot be an accident that most of the theoretical battles over legal interpretation are fought in the realm of constitutional theory. And, of course, constitutional theory heavily relies on political philosophy.[8] Some of the relevant theoretical problems of legal interpretation must belong to practical philosophy, more specifically to political philosophy.

I do not argue, however, that the whole theoretical problem of legal interpretation belongs to political philosophy. Tom Campbell argues for something like this, and I would like to distinguish my position from his claims. Campbell does not deny that theories concentrating upon the general features of interpretation have a bearing on our understanding of legal interpretation.[9] But he denies the possibility that we can lay the foundations of a normative theory of legal interpretation by way of a politically neutral conceptual analysis. The views we have about legal interpretation are ultimately dependent upon the way we perceive issue like that of the separation of powers, the role of the judges, etc.

Up to this point, I agree with Campbell's suggestions. However, he goes on to reconsider the very concept of legal interpretation. He treats theories of legal interpretation as being inevitably part of a broad political theory about the proper allocation of power in society. And as the whole theoretical issue is deeply embedded in political philosophy, it seems to him that "selecting a theory of legal interpretation (...) is not dependent on any general theory of

[8] See Perry, M. J.: Why Constitutional Theory Matters to Constitutional Practice (And Vice Versa). In: Leyh, G. (ed.): *Legal Hermeneutics: History, Theory, and Practice*. Berkeley and Los Angeles, 1992. 250.

[9] See Campbell, T.: Grounding Theories of Legal Interpretation. In: Goldsworthy, J.–Campbell, T. (eds.): *Legal Interpretation in Democratic States*. Aldershot, 2002. 30.

interpretation or controversial theory of meaning."[10] This is where Campbell goes too far. What we can legitimately claim is that theories of general interpretation are indeterminate in respect of some crucial issues of legal interpretation, and they need to be supplemented with other (e.g. political philosophical) considerations. But even if the emphasis shifts towards political philosophy, we still need conceptions of legal interpretation that are consistent with some viable view on the general features of interpretation. In this sense, selecting a theory of legal interpretation is indeed dependent on general theories of interpretation. The practical philosophical considerations that help to account for the distinctive features of legal interpretation should not be taken as isolating the theoretical analysis from the broader philosophical problem of interpretation.[11] General theories of interpretation are not unimportant for us, but what we can learn from them just cannot be enough to lay the foundations for a tenable normative theory of legal interpretation.

My analysis will face political philosophical problems that are identified as intrinsically relevant to normative theory of legal interpretation. However, the pertinent political philosophical issues will be left open for they cannot be answered adequately on the basis of the considerations mobilized by this essay. That is why I said in the first paragraph that the argument presented here would be incomplete.

Without accepting the abovementioned methodological point about the role of political philosophical considerations, I would not have written this particular essay. In respect of the general theories of interpretation, I happen to be a sort of intentionalist. I believe that any full understanding of a text must pay attention to the intentions that gave rise to the speaker's meanings in the interpreted text. If I could take it as implying the truth of intentionalism about legal interpretation, the refutation of non-intentionalism would not require a legal theoretical analysis. But the challenge of non-intentionalism is more stubborn. For one, non-intentionalists can accept that any full interpretation needs to pay attention to authorial intentions, and yet insist that legal interpretation aims at no more than a *partial understanding* of the legal text. It is possible that non-intentionalist interpretive strategies are capable of revealing the "legally relevant"

[10] *Ibid.* 33.

[11] For similar reasons, I reject attempts to reduce the whole activity of interpretation to some moral or political function. This view is well exemplified by Stanley Fish who regards interpretation as the effort of a morality (or agenda) "to extend itself into the world by inscribing its message on every available space". Fish, S.: *There is No Such Thing as Free Speech and it's a Good Thing, Too.* New York, Oxford, 1994. 142. I do not think that such approaches can be coherent.

meanings of legal texts, while intentionalist strategies reveal something else–something legally irrelevant.

It indicates that we should pay attention to the features that make legal interpretation specific. As far as I can see, those features are associated with the close connection between legal interpretation and the process of making legal decisions. The following two of them are certainly crucial for us. The first is that legal interpretation has a strictly *practical orientation*. Legal interpretation seeks to reveal the practical guidance that the legal text provides, and remains indifferent to anything that goes beyond this task. The second feature is that legal interpretation raises issues concerning the *agent of interpretation* in a peculiar way.

The first distinctive feature makes it a prerequisite to any plausible theory of legal interpretation to have a good understanding of the kind of practical guidance that the law seeks to provide, and general theories of interpretation are unlikely to be able to facilitate this understanding. A general theory of interpretation can make us understand that legal interpretation is guided by practical orientations,[12] but it cannot be specific enough in respect of the relevant practical orientations.[13] Practical orientations have many versions, and it is simply beyond the reach of a general theory of interpretation to provide the necessary specification for the practical orientation inherent in legal interpretation. If we want to identify the kind of practical guidance characteristic of law, we face issues concerning the authority of law. Conceptual points about the authoritativeness of law will play a crucial role in the following analysis.

The second distinctive feature I mentioned manifests itself in the fact that legal interpretations carried out by the decision-makers have an overriding significance. Every lawyer knows that there are many ways of understanding the practical requirements involved in a particular legal directive, and many techniques of interpretation can be mobilized to support those "understandings". But the understanding that really matters is that of the judiciary. Once it is revealed, the debate over the correct interpretation of the directive becomes largely academic.[14] This point is underlined by the fact that the overriding

[12] See Gadamer, H.-G.: *Truth and Method*. London, 1989. 324–341.

[13] This problem of specification is well brought out by Arthur Glass who rightly claims that Gadamer's concept of 'application' is far too ambiguous from a legal theoretical point of view. See Glass, A.: A Hermeneutical Standpoint. In: Goldsworthy–Campbell (eds.): *Legal Interpretation in Democratic States. op. cit.* 136. However, he seems to treat it as a shortcoming of Gadamer's analysis. In my view, it is not: it is an acceptable implication of the abstractness of Gadamer's analysis.

[14] Of course, there is an element of rhetorical exaggeration in this claim. The interpretations of legal texts by the police, prosecutors, administrative agencies, etc. all matter

significance of the decision-makers' interpretations is not dependent on their expertise (on their epistemic authority). Judicial interpretations are often condemned as mistaken (even silly) and often for good reasons. Nevertheless, they can and do retain their priority to rival interpretations. They can be defeated not by providing a better interpretation of the misinterpreted legal directives but by setting in motion certain institutional procedures (like legislation or overruling).

It indicates that, for a normative theory of legal interpretation, considerations concerning the institutional characteristics of law can turn out to be more decisive than anything that we can learn from any general theory of interpretation. It seems to me that the most important current debates over legal interpretation (including the debate between the intentionalists and the non-intentionalists) cannot really be addressed by any approach that general theories of interpretation can offer.[15] Non-intentionalists can still win the day if they are capable of building their claims on a superior understanding of the institutional features of legal interpretation.

Legal authority and intentionalism

We have seen that the character of legal interpretation is partly determined by the institutional features of law. However, the law has many institutional features, and most of them are largely irrelevant to our present concern. We need to point to the particular features that may prove decisive in respect of the debate over intentionalism.

Contemporary legal theorists have many suggestions concerning this issue. Some of them concentrate on *substantive* practical philosophical issues (like issues of legitimacy). Jeffrey Goldsworthy's suggestion points to a commitment to the value of *legislative supremacy*–a commitment deeply embedded in our ideas about constitutionalism. For Goldsworthy, legislative supremacy becomes an empty phrase if intentionalism fails. If the intentions of the legislators do not matter, we end up with some sort of judicial supremacy: the judges' own value judgements will guide and limit the changes of the meanings of statutes.[16]

(even when they disagree with the judges' understanding). But not in a way that would undermine the point I am trying to make.

[15] See Glass: *op. cit.* 146–147.

[16] See Goldsworthy, J.: Legislative Intentions, Legislative Supremacy, and Legal Positivism. In: Goldsworthy–Campbell (eds.): *Legal Interpretation in Democratic States. op. cit.* 55. Of course, substantive arguments can support non-intentionalism as well. See,

I find this argument particularly attractive. But the argument relies on an intimate connection between issues of interpretive strategy and the *authority relations* inherent in the institutional structure of law. That connection cannot be established without revealing important conceptual points about the authority of law. Substantive arguments like this must be built upon the relevant conceptual arguments.[17] This is why my analysis will concentrate on conceptual arguments concerning intentionalism and non-intentionalism.

Many contemporary legal theorists believe that the decisive conceptual feature of law that is ultimately relevant to the debate over intentionalism concerns the authority relations on which the whole structure of law was built. Some of them also believe that understanding the characteristics of legal authority vindicates intentionalism. In the following analysis, I will take this view as the *standard conceptual justification of intentionalism.* The rest of the views will be seen as challenges to this argument.

We can easily point out the connection between the problem of legal authority and legal interpretation. I have mentioned above that legal interpretation aims at understanding the practical guidance that the law provides to us by way of the legal text. As practical guidance can be provided in many ways, it is part of the interpretive task to understand the *nature* of the practical guidance provided by the law. Successful legal interpretations presuppose a good understanding of the difference the law makes to our lives.

Sometimes the practical guidance consists in revealing reasons that are worth considering. (This is a version of giving advice.) But the law is not a system that seeks to give us mere advice. Sometimes the practical guidance helps us understand the connection between some pre-existing duty and a certain course of action. But it is not characteristic of the law to refer back to pre-existing duties. On other occasions the practical guidance itself creates a duty to behave in a certain way. In this case, the practical guidance is of an authoritative nature. Many claim that this is exactly the kind of practical guidance that that law typically provides. In the typical case, legal interpretation must lead to understanding the directives of law as *authoritatively binding* on us.

But how is this related to the issue of intentionalism? The key consideration is that legal directives are not genuinely authoritative. It is the nature of

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e.g., Ball, T.: Constitutional Interpretation and Conceptual Change. In: Leyh (ed.): *Legal Hermeneutics... op. cit.* 133–134.

[17] On the level of conceptual analysis, it may turn out that Goldsworthy's claim partly misconceives the problem of legislative supremacy. For a suggestion to this effect, see Allan, T. R. S.: Constitutional Dialogue and the Justification of Judicial Review. In: 23 (2003) *Oxford Journal of Legal Studies,* 563–584. 575.

authority relations that they are constituted as *human relations*.[18] Only persons or groups of persons can have genuine authority. Legal directives are always issued by persons or groups of persons, and must be taken as manifestations of their authority claims. The legal directives that we reveal from legal texts have some kind of derivative authority: they are always some person's (or persons') judgement on other people's conduct.[19] The function of legal texts is to help us figure out what practical guidance the genuine authorities have given to us.

This formulation of the features of legal authority undeniably lends some support to intentionalism. It seems that such considerations (and some related ones) underlie Joseph Raz's claim that the justification for treating law as valid derives from the authority of its makers, and laws are to be understood in light of the intentions of their makers. It is built into the notion of practical authority that law claims.[20] Larry Alexander and Andrei Marmor, who use Raz's theory of authority as a starting point, are both committed to pretty much the same view.[21]

Challenges to intentionalism I.: The availability of legislative intentions

We now have an idea of the standard conceptual justification of intentionalism. We can begin to assess the challenges to it. As the pertinent version of intentionalism relies heavily on explaining the normativity of law in terms of certain authority relations, one obvious way of challenging this view is to call into question the account of legal authority underlying it. There are authors who deny that the law claims authority,[22] and there are others who deny that law can have practical authority.[23] Their views are certainly relevant for us, particularly because some of them have been explicitly used to put forward non-intentionalist claims about legal interpretation.[24] However, I set aside those

[18] Cf. Raz, J.: *Ethics in the Public Domain*. Oxford, 1994. 216–217.

[19] See *ibid.*

[20] See Raz, J.: Why Interpret? In: *Ratio Juris*, 9 (1996) 359. See further Raz, J.: Intention and Interpretation. In: George, R. P. (ed.): *The Autonomy of Law: Essays on Legal Positivism*. Oxford, 1996. 280.

[21] See Alexander, L.: All or Nothing at All?: The Intentions of Authorities and the Authority of Intentions. In: Marmor (ed.): *Law and Interpretation... op. cit.* 358–363. Marmor: *Interpretation and Legal Theory. op. cit.* 176.

[22] See, e.g., Soper, Ph.: *The Ethics of Deference*. Cambridge, 2002. xiv. and 54.

[23] See, e.g., Hurd, H. M.: Sovereignty in Silence. In: 99 (1990) *The Yale Law Journal*, 945–1028. 1007–1022.

[24] See e.g. Hurd, H. M.: Interpreting Authorities. In: Marmor (ed.): *Law and Interpretation... op. cit.*

suggestions in the present essay. A proper assessment of them would require us to provide an extensive discussion of the theoretical problem of authority and the conceptual characteristics of law, and that would go well beyond the ambitions of the present inquiry. I am convinced, however, that there are important conceptual characteristics of law that cannot be accounted for if we deny that law claims practical authority. I have expressed and defended that conviction elsewhere.[25] I restrict myself to the claim that an analysis of the normativity of law that remains within the boundaries of the Razian account of practical authority is still the best available theoretical option for us. I accept that most of the claims I make in this essay stand and fall with this controversial commitment.

We had better turn now to other challenges to the standard conceptual justification of intentionalism. Many non-intentionalists think that the best way to undermine the intentionalist position is calling into question our ability to retrieve any legislative intention that could be used as a basis for interpretive claims. In the relevant sense, there is no legislative intention that could help the intentionalist. In the past twenty years, two important and influential authors, Ronald Dworkin and Jeremy Waldron, have put forward non-intentionalist claims along these lines. They certainly deserve some attention here.

Let me start with Waldron's arguments. His central claim revolves around the obvious fact that modern statutes are produced by the deliberations of large multi-member assemblies.[26] Waldron readily admits that intentionality plays a crucial role in the legislative process.[27] The specific target of his critique is the concept of "the intention of the legislature": there is no state or condition corresponding to this concept. It makes sense to talk about the intentions of the individual legislators but attributing particular intentions to the legislature or the statute is a different matter. Individual intentions usually point to various directions, and what we know about the intentions of individual legislators is not enough to settle any interpretive dispute (even though such intentions can be loosely associated with the human authorship of the statute). Hence, intentionalism must be wrong.

The trouble with this argument is that what we have here is not really a refutation of the conceptual possibility of finding genuine legislative intentions

[25] See Bódig, M.: *Jogelmélet és gyakorlati filozófia: Jogelméleti módszertani vizsgálódások* [Jurisprudence and Practical Philosophy: Jurisprudential Methodological Investigations]. Miskolc, 2004. 525–527.

[26] See Waldron, J.: Legislators' Intentions and Unintentional Legislation. In: Waldron: *Law and Disagreement*. Oxford, 1999. 121.

[27] See *ibid.* 142.

behind a product of legislation but some difficulties that make it often difficult or even hopeless. It seems to me that that makes Waldron's argument ineffective against several forms of intentionalism. The argument is ineffective against relying on "legislators' intentions" in a minimalist sense: the legislators participate in a process that has legislative effect, and understand the process as having that function. On this ground, we can ascribe to the legislative body the intention that the enacted clauses should take effect as valid legal rules.[28] It is more important to us that there is room here for another, slightly stronger sense of "legislators' intentions". Quite wisely, Waldron does not deny the possibility of group intentions.[29] A combination of intentions can sometimes amount to a collective intention,[30] and we have no reason to deny that it can happen to legislative assemblies as well. But admitting this amounts to saying that the intentionalist approach can work at least in some cases.[31] Hence, Waldron's argument is strong enough to force the intentionalist to admit that intentionalist interpretive strategies can break down. Furthermore, it may be strong enough to show that it can happen very often. However, these are claims that a sensible intentionalist would not deny anyway. It is enough for her to claim that legislative intentions matter in legal interpretation–when they are available.

Let me turn now to Ronald Dworkin. As is well known, his *Law's Empire* has a series of arguments that are directed against a form of intentionalism.[32] These arguments are well known, and I will not rehearse them here. But let us look at the exact target of his arguments. He calls his target the "speaker's meaning view" of statutory interpretation: "it assumes that legislation is an occasion or instance of communication and that judges look to legislative history when a statute is not clear on its face to discover what state of mind the legislators tried to communicate through their votes."[33] So the target is an extreme version of intentionalism that sees the task of the interpretive enterprise in retrieving certain mental states of the legislators. I have no wish to deny that Dworkin's

[28] See MacCormick, N.: *Legal Reasoning and Legal Theory*. Oxford, 1978. 209. In a sense, even Waldron grants this. See Waldron: *op. cit.* 127.

[29] He seems to admit the theoretical possibility of an "Aristotelian synthesis" of the views and actions that contributed to the legislative process. See Waldron: *op. cit.* 136–138. Andrei Marmor certainly took advantage of this when he tried to reply to Waldron's non-intentionalist arguments. See his Authorities and Persons. In: *Legal Theory*, 1 (1995) 337–359., 341–342.

[30] See Bratman, M.: Shared Intention. *Ethics*, 104 (1993) 97–113.

[31] Jeffrey Goldsworthy is quite right in claiming that common sense sometimes can reveal legislative intentions. See Goldsworthy: *op. cit.* 49.

[32] See Dworkin, R.: *Law's Empire*. London, 1986. 317–327.

[33] *Ibid.* 315.

arguments are devastating for those who are committed to this "psychologised" version of intentionalism. But we can talk about legislative intentions in more than one sense,[34] and there can be versions of intentionalism that are not guilty of this rough "psychologism". As a matter of fact, one can see in contemporary versions of intentionalism a strong "depsychologising" tendency. Raz's "interpretation without retrieval",[35] the concept of "inchoate intention" developed by Alexander and Sherwin,[36] or Allan's "constructive intention"[37] are all instructive examples in this respect.[38] In contemporary legal theory there has been much argument about the meaningfulness of attributing intentions to legislative bodies. It seems to me that the actual upshot of those arguments is that we see the inadequacy of a certain "psychologising" approach to legal interpretation that was doomed anyway.

Challenges to intentionalism II.: The problem with old laws

In my view, the most serious challenge to the standard conceptual justification of intentionalism is what we may call the problem with old laws. I have indicated that the legislators' intentions matter because they have authority over us. But what if it makes no sense, at least in a number of cases, to speak of the authority of those who enacted the interpreted statute? Some claim that this is exactly the case with laws enacted long ago. Michael Moore, for example, makes a case for non-intentionalism partly by claiming that much

[34] *Cf.* Bix, B.: Questions in Legal Interpretation. In: Marmor (ed.): *Law and Interpretation... op. cit.* 142–146.

[35] See Raz, J.: Interpretation Without Retrieval. In: Marmor (ed.): *Law and Interpretation... op. cit.*

[36] See Alexander, L.–Sherwin, E.: *The Rule of Rules: Morality, Rules, and the Dilemmas of Law*. Durham, London, 2001. 7–14.

[37] See Allan: Constitutional Dialogue... *op. cit.* 581. See further Allan, T. R. S.: Legislative Supremacy and Legislative Intent: A Reply to Professor Craig. In: *Oxford Journal of Legal Studies*, 24 (2004) 4. 563–583. 568. It is worth noting that Allan's ideas concerning constructive intention are hotly debated by Paul Craig, and Allan's ideas have been developed partly in the debate with Craig. See Craig, P.: The Common Law, Shared Power and Judicial Review. *Oxford Journal of Legal Studies*, 24 (2004) 2. 237–257., 241–242. Craig. P.: Legislative Intent and Legislative Supremacy: A Reply to Professor Allan. 24 (2004) 4. *Oxford Journal of Legal Studies*, 24 (2004) 2. 585–596., 585–587.

[38] Ironically, even Dworkin can be seen as advocating some sort of a "depsychologised" intentionalism. The judge who represents Dworkin's ideal of proper statutory interpretation "will treat Congress as an author earlier than himself in the chain of law." Dworkin: *op. cit.* 313.

of the legal material to be interpreted was created by people who have no authority above us. Their "authorship" cannot account for the claims the legal documents make on our actions.[39]

As far as I can see, contemporary intentionalists do not have a good answer to the problem of old laws. Andrei Marmor, for example, sees it as a problem of legal validity: we need to explain the continuing validity of the norms of the legal system. He claims that this continuing validity is determined by certain rules or conventions.[40] These rules or conventions may be regarded as part of the "rule of recognition" of the pertinent legal system. The problem is that this suggestion heavily relies on a form of legal positivism (a conventionalist view of the normativity of law) that is highly controversial. In fact, I regard that version of legal positivism as profoundly mistaken.[41] So I shall keep away from it.

In my view, the best effort to tackle the problem is made by Joseph Raz. His solution is based on the idea that *continuity* is a prominent value in legal systems. We attribute legal normativity to old laws because we respect the ethical reasons that call for continuity in the operations of the legal system.[42] This may be the best available effort but it still seems problematic to me. It implies that there is a crucial difference between new laws and old laws in respect of the grounds of their normativity. In the case of new laws, these grounds are associated with the authority of their makers, while in the case of old laws they are associated with certain specific moral values. The problem is that this view presupposes that some laws are normative for different reasons than others in our legal systems, and I see no reason to accept this presupposition.[43] We should have a better way of handling the problem with old laws.

Authority and sovereignty

The problem with old laws may well be taken as indicating that we should dig deeper into the implications of the view that the features of legal authority have a crucial impact on the issue of proper interpretive strategy. The source of the problem is obvious. The account of legal authority that we relied on

[39] See Moore: *op. cit.* 14.

[40] See Marmor: *Authorities and Persons. op. cit.* 355.

[41] See Bódig: *op. cit.* 63–102.

[42] See Raz: *Why Interpret? op. cit.* 359.

[43] I do not claim that all laws should be taken as authoritative for exactly the same reasons in a legal system. But Raz's view allows for a divergence of the reasons underlying the normativitity of different laws that I do not find tolerable.

assumed that legal authority is a relation between human beings: it has a *personal* element. It serves the intentionalist position well in certain respects (it explains quite neatly why the legislators' intentions matter), but it leads to problems where the personal "bond" between the authority and the subjects is broken though the directives issued by the authority still claim to be authoritatively binding.

We need a better understanding of the authority relations involved in legal decision-making. It may be that, at the end of the day, we will be forced to accept Waldron's suggestion that we should not treat the authority of the legal text as dependent on the authority of its authors. We have got to give up the "personification" of legal authority: we have got to attribute impersonal authority to legislative decisions.

This claim happens to be another limb of Waldron's non-intentionalist argument that we have taken into consideration above. According to Waldron, the authority of statutes has not much to do with the personal qualities of the legislators for the authority claim inherent in those statutes "consists in their ability to integrate a diversity of purposes, interests, and aims among their members into the text of a single legislative product".[44] If the integration of the diverse purposes could be carried out by an impersonal mechanism, it would have an equally legitimate claim to authority.[45]

I have no wish to consider here Waldron's suggestions concerning the reasons that make subjection to the authority of an impersonal mechanism reasonable. Even if they were appealing, Waldron would still miss the point. The standard conceptual justification of intentionalism is not based on justificatory claims concerning certain possible versions of legal authority: it is based on an account of the conceptual features of legal authority. So the real question is whether Waldron's suggestions[46] are capable of giving a better account of those features. And it seems that they are not. Waldron's impersonal conception of legislative authority cannot account for at least one important feature of the normative force of legal directives: their (relative) *content-independence*.[47] One can hardly attribute content-independent normative force to impersonal mechanisms.[48]

[44] Waldron: *op. cit.* 121.

[45] See *ibid.* 126–127.

[46] See *ibid.* 131.

[47] See Marmor: *Authorities and Persons. op. cit.* 345–346.

[48] It is something that seems to be implied in the very definition of content-independence. When Joseph Raz characterizes the content-independence of authoritative directives one of

It seems to me that the idea that legal authority is based on relations between persons is basically sound. But we have to make clearer the personal element of legal authority. We have got to see that legal authority is personal in a relatively weak sense. To see an authority relation that is personal in a strong sense, we may point to parental authority. It is so strongly personal that, in a sense, it excludes succession. It sometimes happens that a man takes the position of the original father in the family. Can we say that the stepfather's role will be a continuation of the parental authority of the original father? I do not think so. The stepfather will not become a proper authority without successfully establishing a unique personal relationship with the children.[49] Without that, he will never have proper parental authority (no matter what the law says). And, if he does establish the necessary personal relationship successfully, his authority will have not much to do with the parental authority of the original father. It will be a new authority relation and not the continuation of a previous one.

Legal authority is not personal in this sense. Old legal officials are often replaced with new ones but it would be silly to claim that the newly appointed officials need to establish some special personal relationship with anyone in order to become proper legal authorities. They are proper authorities from the very moment of their appointment, and their practice is the continuation of the practice of their predecessors. If there are unfinished jobs (undecided cases) left by their predecessors, it will be their duty to finish them, and it will not be a new procedure in any relevant sense.

What should all this indicate to us? I think the difference between legal and parental authority has a lot to do with the fact that the legal official, unlike the father, does not stand for himself in the authority relation. It is not her person that matters but the role she plays. This is why she can be replaced without destroying the authority relation. One way of putting this insight is to say that the legal official is a *representative* (while the father does not represent anyone). For this reason, let me call the legal officials' authority "representational authority".[50]

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the features he mentions is that "his saying so would be reason for any number of actions". See his *The Morality of Freedom*. Oxford, 1986. 35.

[49] Of course, I have no wish to deny that someone who "takes up" the role of father may have roughly or exactly the same rights and duties as someone who had that role biologically.

[50] This consideration is relevant to one of Waldron's further claims. He argues that intentionalism is in conflict with the rule law, and, for this reason, it raises legitimacy problems. If we suppose that the legislators have personal authority over the law they enact "it is impossible that a law could have *authority vis-à-vis* a legislator." Waldron: *op. cit.*

Some elements of this claim can be found in several theoretical accounts,[51] and it is should sound familiar for those aware of the ordinary facts of everyday legal practice. Judges do not announce their decisions in their own name: they announce them in the name of the Republic or the Crown or something like that. Statutes are not kept in the archives under the name of the particular legislators.[52] But how could it provide the basis for tackling the problem with old laws? Well, it allows us to say that, in the case of legislative authority, it is not a particular group of legislators to which we should attribute authority but an institutionalized assembly that is "filled" with different members time to time without any real change in the character of the underlying authority relation. Even if all the former members are replaced with new ones, the proceedings of the assembly will be the continuation of the same authority relation. Old laws have the same authority as the new ones if they are associated with the same authority relation. They are embedded in a continuous authoritative practice.[53]

It seems obvious to me that this revised version of the standard conceptual justification is still good enough to give support to the intentionalist cause. Institutions like legislative assemblies do not exercise their authority without having members who act in their name. Although the legislators are only representatives, as long as they hold their positions in the legislature they are the ones who are entrusted to provide practical guidance in the form of statutes: their intentions matter. And, in this respect, there is no difference between the legislators of the present and the past.[54]

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139. We can fend off this objection, however, by insisting that the legislators have personal authority over the law only within the limits of their institutional role. In every other respect, they are no less bound by it than any other subject. See Marmor: *Authorities and Persons. op. cit.* 355.

[51] Cf. Raz, J.: On the Authority and Interpretation of Constitutions: Some Preliminaries. In: Alexander, L. (ed.): *Constitutionalism: Philosophical Foundations.* Cambridge, 1998. 184–185. See further Marmor: *Authorities and Persons. op. cit.* 355.

[52] Cf. MacCormick, N.: Norms, Institutions, and Institutional Facts. *Law and Philosophy.* 17 (1998) 301–345. 332.

[53] Of course, there may be complications with this approach. As the right to legislate is sometimes transferred from one assembly to another, we will have to cope with the problems of institutional change.

[54] This point could be amplified by a consideration that I largely ignore here. The fact that different legal officials operate within the framework of identical or closely related authority relations manifests itself in the fact that the legislators' decisions become embedded in the practice of many other officials who will inevitably shape them. Later legislators amend the old statutes, and the judicial practice has an impact on the ways they are understood.

Legal Authority and Sovereignty

Though this may sound promising, the analysis is in need of a series of further clarifications if it is to be regarded as really successful in solving our problems with old laws. We have got to provide an answer to the question: "who is represented by the legislators?" There are two kinds of answers that certainly will not do here. It would be misguided to claim that legislators are representatives of the law because our problem raises questions about the way the law itself becomes authoritative. The very existence of law presupposes certain authority relations that we have to account for here. It would be equally misguided to claim that legislators are the representatives of the legislative assembly to which they belong. Legislative bodies do not exist until they are set up by certain people.

It is quite clear what kind of answer we need. If we raise questions concerning the grounds of the officials' authority we want to know something about *sovereignty*. The issue of sovereignty is a tricky issue partly because sovereignty can have several sources and can take several forms. But this is not the real problem: we can restrict our attention (without fatally undermining the validity claims of our analysis) to the case of constitutional democracies where we have a standard answer to the question of the source of authority. In respect of constitutional democracies, the first step in the analysis is easy. The legislators openly announce themselves as representatives: representatives of the *people*. It seems that we need to look for some conception of popular sovereignty, and the legislators should be treated as representatives of the political community as a whole. However, a series of conceptual problems are likely to arise at this point. One could say that political communities are not agents: they never make decisions, and never set up institutions. And although the political community's inability to act explains why it needs representatives, it is likely to make highly controversial any suggestion concerning the process that endows legal institutions and officials with their authority.

Of course, there can be ways of handling this problem. For example, we can take recourse to political morality, and argue that some shared political morality turns a multitude of people into a political community.[55] Then, official action (and, most of all, the legislative practice) can be treated as authoritative as long as it remains within the boundaries of that shared political morality. Justificatory question concerning the practice of the officials can be tentatively answered with the help of a legitimising process in which the ordinary members of the political community are invited to participate. Unfortunately, this line of

[55] See Bódig: *op. cit.* 540–541.

argument is likely to lead to a series of controversial and rather counter-intuitive claims–and not only because one can reasonably doubt whether we can in fact find a shared political morality in an existing political community. There is something odd in treating the law as being based on a pre-existing political morality. Typically, it is the law (especially the Constitution) that helps people acknowledge the issues of political morality, and it functions as the best reliable source of information about the political morality of their community.

Although I have struggled with them,[56] I have no wish to pretend that I know how to handle those extremely complicated issues. However, I am sure that we have to confront them if we work on normative theories of legal interpretation. It does not mean that anyone who is about to rely on intentionalist interpretive strategies must tackle the problems of sovereignty. But the theoretical efforts cannot escape them. In order to have a proper understanding of the distinctive features of legal interpretation, we need to refer to the grounds of law's normativity, and it leads to some of the complicated problems of normative political theory.

It is important to emphasise that the core idea that I set forth here is not at all alien to contemporary analyses of the problem of legal interpretation.[57] It is hard to deny that legal interpretation has a lot to do with the proper allocation of institutionalized public authority in a society. When the constitutional interpretation is at issue, legal theorists tend to realise this. Both Joseph Raz's and Michael Moore's accounts of constitutional interpretation heavily rely on claims concerning the grounds of the normativity of the Constitution.[58] In this that respect, most legal theorists realise that the theoretical problems of legal interpretation raise political philosophical issues. We need to take it seriously when we conduct our debates over intentionalism.

[56] See *ibid.* 525–535.

[57] See Allan: Constitutional Dialogue... *op. cit.* 582–583.

[58] See Raz: On the Authority and Interpretation of Constitutions. *op. cit.* 173. See Moore: *op. cit.* 14.

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GÁBOR SULYOK*

Thoughts on the Necessity of Security Council Reform

Abstract. The declared objective of recent efforts to reform the Security Council is to increase effectiveness. A careful investigation applying certain theses of organization theory, however, reveals that neither the prevailing structure nor the working methods of the Council unavoidably hamper the achievement of organizational goals; therefore, arguments pertaining to the issue of effectiveness do not necessarily justify reform proposals. A similar conclusion can be reached by examining other possible causes of reform, namely the fundamental change of organizational environment, power struggles between various principal organs of the United Nations, and some harshly criticized features of the Council itself. It seems that the necessity of reform is rooted in various individual and highly subjective interests of member states rather than objective circumstances, and the organization has no other option, but to fulfill their demands in order to secure its own survival.

Keywords: United Nations, Security Council, reform union

The United Nations Security Council is unique in numerous aspects. First and foremost, it is unique with respect to its composition involving both permanent and non-permanent members, its decision-making procedure founded on a right of veto of permanent members as well as its exceptionally broad powers virtually lacking any institutional control and including a right to adopt legally binding decisions. It is also unique owing to its primary responsibility for the maintenance of international peace and security, extreme flexibility, influence on global politics, public recognition and the tremendous amount of attention drawn by its activities. Last, but not least it is unique regarding the quantity and harshness of criticism formulated against it. There has not existed another body in the history of international relations–including its predecessor and "companion in misfortune", the Council of the League of Nations–that has stood in the crossfire of criticism for such a long period of time, caused disappointment

* Assistant Professor, Department of Public and Private International Law, Széchenyi István University, and Research Fellow, Institute for Legal Studies, Hungarian Academy of Sciences.
E-mail: gsulyok@freemail.hu. This paper was supported by the Bolyai János Research Scholarship of the Hungarian Academy of Sciences.

or been declared a scapegoat with such frequency, or given rise to the need of comprehensive reform so often. Even though claims of reorganization are coeval with the Council itself, critical voices and calls for reform have sensibly grown more abundant at the turn of the millennium. This study, therefore, seeks to throw new light on efforts aimed at the reconstruction of the Security Council by invoking certain theses of organization theory.

I.

Reform is a normal and inevitable part of life in every organization. The need for change may originate from a number of sources. It may arise as a consequence of external factors, such as fundamental change of organizational environment, external pressure of members striving for reallocation of power within the organization, or negative judgement by the public opinion.[1] Organizations, however, may be compelled to change by various internal factors, as well. These factors include, for instance, structural and operational defects in the organization, emerging power struggles between organizational units created in line with the division of labour, low internalization of organizational values or general discontent among members as well as limited membership involvement.[2] In case an organization fails to adapt to its new environment, or ignores the expectations of its members or the public opinion, it may easily become unable to fulfill its tasks and be marginalized or even dissolved. Thus reform,

[1] It is frequently claimed that organizations do not operate in a vacuum. See Blau, P. M.–Scott, W. R.: *Formal Organizations: A Comparative Approach.* San Francisco, 1962. 9. Being an open system, the organization is in constant interaction with its environment: it is both an author and an object of environmental change. Its activities shape the environment, the characteristics of which in turn, whether or not produced by the organization, greatly determine organizational structure and procedure. The environment, therefore, generates specific requirements for the organization, and the better it meets these requirements the more successful it will be. See Guiot, J. M.: *Szervezetek és magatartásuk.* [Organisations sociales et comportements] (Ritter, M. transl.) Budapest, 1984. 81.

[2] Low membership involvement poses an extremely serious problem in voluntary organizations primarily established for the mutual benefit of members. International organizations come under this category, because states join them in a voluntary manner and in anticipation of certain benefits. "Voluntary" in this case means that only those states belong to international organizations that have expressed the desire to become members, and only those remain members that have not expressed the desire to withdraw. See Virally, M.: Definition and Classification of International Organizations: A Legal Approach. In: Abi-Saab, G. (ed.): *The Concept of International Organization.* Paris, 1981. 52.

as a general rule, is an essential precondition of long-term organizational survival rather than a purely aesthetic intervention.

This is excellently illustrated by the history of the Warsaw Pact[3] and the North Atlantic Treaty Organization.[4] The former was unavoidably doomed to failure at the end of the Cold War, as its members, having regained their freedom of choice with the fading of Soviet influence and lacking both the internalization of organizational values and the willingness to participate, had no intention whatsoever to preserve the organization by means of reform. The Warsaw Pact did not have a chance to adapt to the requirements of the new world order; therefore, it was terminated on the basis of fundamental change of circumstances.[5] The North Atlantic Treaty Organization, on the other hand, survived the alteration of organizational environment thanks to the unflagging loyalty of its members, and as a result of wide-ranging reforms–including the admission of new members, the rearrangement of capabilities and the undertaking of novel responsibilities in addition to original goals–it was at least temporarily able to sustain its *raison d'être*.[6]

Consequently the emergence and intensification of demands for a comprehensive reform of the United Nations, embracing the restructuring of the Security Council, is to be considered a normal and inevitable phase of organizational lifecycle.[7] Irrespective of increased media and public attention,

[3] Promulgated in Hungary by Act No. III of 1955 on the promulgation of the Treaty of Friendship, Co-operation and Mutual Assistance between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, the Rumanian People's Republic, the Union of Soviet Socialist Republics, and the Czechoslovak Republic, signed in Warsaw, on 14 May 1955.

[4] Promulgated in Hungary by Act No. I of 1999 on the accession of the Republic of Hungary to the North Atlantic Treaty, and on the promulgation of the text of the Treaty.

[5] Cf. Parliamentary Resolution 54/1990. (VII. 3.) on the relationship between the Republic of Hungary and the Warsaw Pact.

[6] For a detailed analysis, see Asmus, R. D.: *A NATO kapunyitása. Az új korszak és a szervezet átalakítása* [Opening NATO's Door: How the Alliance Remade Itself for a New Era] (Magyarics, T. transl.). Budapest, 2003; Valki, L. (ed.): *A NATO: történet, szervezet, stratégia, bővítés* [NATO: History, Structure, Strategy, Enlargement] (Gombás, I. transl.). Budapest, undated; Wijk, R., de: *A NATO az ezredforduló küszöbén. Küzdelem a konszenzusért* [NATO on the Brink of the New Millennium] (Barta, R. transl.). Debrecen, 1998. The comprehensive reform of the alliance verifies the statement according to which "[every] organization seeks to survive in whatever way it deems appropriate". See Hall, R. H.: *Organizations: Structure and Process.* Englewood Cliffs, 1972. 36. (Insertion mine.)

[7] The restructuring of the Security Council is, therefore, neither independent nor absolute objective. Similarly to other efforts, including the strengthening of the General

it should not be deemed an extraordinary event or a hard evidence of organizational incapacity. What is more, the delegates participating at the United Nations Conference on International Organization in San Francisco had been absolutely aware of the need for future changes. This is made obvious by the fact that the final text of the Charter explicitly provides for a general review conference, originally not envisaged by the Dumbarton Oaks Proposals[8], over and above the clause on "regular" amendments.[9] There was widespread agreement on the necessity of such conference in San Francisco as it was admitted that since the Charter could not be perfect and all eventual developments in international affairs could not be anticipated, the organization would have to be scrutinized and modified in the light of its experience and the situation then prevailing in order to secure its continued existence. Delegates furthermore emphasized that the newly inserted provision did not mean that the organization would be temporary, but on the contrary, this solution would guarantee its effectiveness and durability.[10]

The *travaux préparatoires* suggest that the founders specifically expected a need for changes to arise in the future with regard to the Security Council. For example, delegates from Cuba, Ecuador, Egypt and Mexico initially called for an increase in the size of the Council, but in subsequently withdrawing their motions, they expressed their hope that their views would be realized as soon as the evolving circumstances permitted.[11] The Cuban representative, in explaining his refusal of permanent membership on the Council, also pointed out that the group of great powers could undergo significant changes in the future as it had done throughout history.[12]

For the time being the Charter has been expressly amended only once on account of the Security Council: a set of new provisions, effective since 31

Assembly, the Economic and Social Council and the Secretariat, it is a means to and an inferior goal of the comprehensive reform of the entire organization. For that reason, Secretary-General Kofi Annan has underlined in various reports that "no reform of the United Nations would be complete without reform of the Security Council". Strengthening of the United Nations: An Agenda for Further Change. Report of the Secretary-General, 9 September 2002, U.N. Doc. A/57/387, para. 20; In Larger Freedom: Towards Development, Security and Human Rights for All. Report of the Secretary-General, 21 March 2005, U.N. Doc. A/59/2005, para. 169.

[8] Dumbarton Oaks Proposals for a General International Organization, Chapter XI.

[9] Charter of the United Nations, Arts 108 and 109. Promulgated in Hungary by Act No. I of 1956 on the promulgation of the Charter of the United Nations.

[10] See U.N.C.I.O. Docs, Vol. VI, 251; Vol. VII, 438.

[11] *Ibid.* Vol. XI, 282.

[12] *Ibid.* 291.

August 1965, has increased the number of its members from eleven to fifteen.[13] However, this measure was followed by several *de facto* amendments and practical modifications affecting both composition and procedure, such as the settlement of the question of Chinese and Russian representation, the clarification of procedural issues concerning abstention and absence as well as various minor changes in the conduct of business performed of the Council's own accord.

II.

The declared objective of Security Council reform is the increase of effectiveness.[14] Each and every particular suggestion contained in official or unofficial proposals, from the improvement of representativeness to the democratization of decision-making to the enhancement of transparency, is merely a means to and an inferior goal of the realization of this objective. Hence in the course of scrutinizing the necessity of reform, one needs to examine effectiveness first. Effectiveness is a notion relating to the goals of an organization or an organizational unit–it reflects the degree to which these goals are achieved.[15] Since effectiveness can be measured, it appears to offer a readily applicable and objective scale by which not only the necessity, but also the success of reform can be judged. Still, this is only make-believe. The determination of effectiveness is, in fact, highly problematic as the object of measurement, that is to say, organizational goal is far from being such tangible a category as it

[13] G.A. Res. 1991A, 1285th plen. mtg., 17 December 1963, U.N. Doc. A/RES/1991A (XVIII).

[14] G.A. Res. 60/1, 8th plen. mtg., 16 September 2005, U.N. Doc. A/RES/60/1, para. 153.

[15] See Barnard, Ch. I.: *The Functions of the Executive.* Cambridge, 1938. 56. Effectiveness should not be confused with efficiency. The criterion of efficiency dictates that, of two alternatives having the same cost in terms of application of resources, that one be chosen which will lead to the larger result and the greater attainment of the organizational objectives. See Simon, H. A.: *Administrative Behavior. A Study of Decision-Making Processes in Administrative Organization.* New York, 1949. 122, 179. Nonetheless, it is obvious that „an organization can be efficient without being effective, and vice versa". Hall: *op. cit.* 96. In Hungarian, both „effectiveness" and „efficiency" translate into the very same expression (*hatékonyság*). Thus it occurs that under the rubric of effectiveness, authors actually discuss the efficiency of the Security Council, that is, its „ability to adopt rational decisions on the basis of reliable information in a timely fashion". See e.g. Turbék Z.: A Biztonsági Tanács reformja [The Reform of the Security Council]. *Kül-Világ* 2 (2005), 37.

may seem.[16] Nonetheless, any examination of the justification of efforts seeking to increase the effectiveness of the Security Council requires a careful investigation of the goals of that principal organ.

An organizational goal is a state of affairs that the organization attempts to realize.[17] Being a consensual aggregate of individual interests and efforts of members,[18] this abstract and collective goal constitutes the purpose of co-operation within the organization, forms the source of its legitimacy, and provides directions for and limitations upon its functioning. The true meaning of the concept of organizational goal is, however, much deeper than that. It equally embraces official goals as pronounced by the founding instrument as well as miscellaneous other documents and statements of high-ranking officials of the organization, operative goals as exposed by the "everyday" practices, decisions and behaviours of the organization, and even unofficial operative goals generated by individual or group interests that can be supportive, subversive or irrelevant from the point of view of the organization.[19] Which should be taken as the basis of determination of effectiveness? Official goals are easily identifiable, but frequently vague and ambiguous, operative goals are more obvious, but extremely hard to disclose, whereas unofficial operative goals are by themselves inadequate for measuring effectiveness as they do not form part of the official policy of the organization. Moreover organizational goals change with time: the aforementioned case of the North Atlantic Treaty Organization superbly exemplifies that an organization may reconsider the relative importance of certain goals, undertake new objectives, or even abandon outdated ones. Further difficulties arise from the fact that organizations usually have more than one, hierarchically structured goals as a result of which the achievement of a given goal can be dependant on the successful realization of an additional goal.[20] (Not to mention those not entirely rare scenarios in which certain organizational goals are in conflict with each other.)

The official goals of the United Nations are laid down in the preamble as well as in Articles 1 and 2 of the Charter. Even though a sole section appears

[16] See Champion, D. J.: *The Sociology of Organizations.* New York, 1975. 41; Hall: *op. cit.* 99–100.

[17] See Etzioni, A.: *Soziologie der Organisationen.* [Modern Organizations] (Baetge, J. transl.) München, 1967. 16.

[18] Cf. Simon: *op. cit.* 114.

[19] See e.g. Perrow, Ch.: The Analysis of Goals in Complex Organizations. *American Sociological Review*, 26 (1961), 855–856.

[20] The structure of organizational goals is hierarchical in a sense that at a given level any goal is simultaneously an ultimate goal of a goal inferior to it, and a means of the attainment of a more global, superior goal. See Guiot: *op. cit.* 31–32.

to explicitly deal with the purposes of the organization, it is practically impossible to draw a sharp and clear-cut distinction between purposes, principles and what is included in the preamble, as emphasized by the *rapporteur* of a committee on general questions at the San Francisco conference. Hence these provisions do not bear substantial differences and should be understood and applied in function of the others in spite of their being located in three distinct structural units.[21]

Being an introduction of the Charter, the preamble reflects the common intentions of founding states, which brought them together at the conference in San Francisco, moved them to unite their will and efforts, and made them harmonize, regulate and organize their international actions.[22] The first four paragraphs of the preamble, therefore, enumerate the general purposes of the organization, that is, to save succeeding generations from the scourge of war, to protect fundamental human rights and equal rights of nations large and small, to maintain justice and ensure respect for international law, and to promote social progress and better standards of life.[23] (The following passages of the preamble contain means rather than goals as the two segments are connected by the phrase "and for these ends".)

The specific purposes of the organizations are embedded in Article 1. These goals are the aggregation of common ends of members, they constitute the *raison d'être* of the organization, and the cause and object of the Charter.[24] Article 1 states that the purposes of the United Nations are:

> "1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to

[21] See U.N.C.I.O. Docs, Vol. VI, 387–388. As purposes and principles are indivisible, they together constitute the test for the effectiveness of the organization and the expected faithful compliance with the provisions of the Charter. See *ibid.* 388. The most important difference between purposes and principles is that the former directly entail obligations neither for the organization nor for the members, whereas the latter undeniably possess a normative character. See Randelzhofer, A.: Art. 2. In: Simma, B. (ed.): *The Charter of the United Nations: A Commentary.* Oxford, 1995. 72.

[22] See U.N.C.I.O. Docs, Vol. VI, 388.

[23] Charter of the United Nations, preamble. For details, see Cot, J. P.–Pellet, A.: Preambule. In: Cot, J. P.–Pellet, A. (ed.): *La Charte des Nations Unies. Commentaire Art. par Art.*. Paris–Bruxelles, 1985. 1–22; Goodrich, L. M.–Hambro, E.: *Charter of the United Nations. Commentary and Documents.* Second, revised edition. London, 1949. 87–92; Kelsen, H.: *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems.* London, 1951. 3–12; Wolfrum, R.: Preamble. In: Simma: *op. cit.* 45–48.

[24] See U.N.C.I.O. Docs, Vol. VI, 388.

the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends."[25]

The operating principles of the organization are contained in Article 2, wherein members recognize the sovereign equality of states, and pledge to fulfill in good faith the obligations assumed arising from the treaty, to settle their international disputes by peaceful means, to refrain from the threat or use of force, to give the organization every assistance in any action it takes, and to abstain from assisting states against which preventive or enforcement actions are taken. In addition, the organization vows to ensure that non-members also act in accordance with these principles so far as may be necessary, and undertakes not to intervene in matters, which are essentially within the domestic jurisdiction of any state.[26]

These purposes and principles all point toward an ultimate goal, an ideal hundreds of years old: collective security.[27] Collective security is one possible

[25] Charter of the United Nations, Art. 1. The „purpose of purposes" is, of course, to maintain peace. Bedjaoui, M.: Art. 1 (Commentaire général). In: Cot–Pellet: *op. cit.* 24. In a similar manner, see Jiménez de Aréchaga, E.: International Law in the Past Third of the Century. *Recueil des Cours* 159 (1978-I), 91. For details, see also Goodrich–Hambro: *op. cit.* 93–98; Kelsen: *op. cit.* 13–53; Wolfrum, R.: Art. 1. In: Simma: *op. cit.* 49–56.

[26] Charter of the United Nations, Art. 2. For details, see Cot–Pellet: *op. cit.* 71–160 (contributions by Dupuy, R.-J.–Mbaye, K.–Zoller, E.–Carpentier, J.–Virally, M.–Mahion, A.–Guillaume, G.); Goodrich–Hambro: *op. cit.* 98–121; Randelzhofer: *op. cit.* 72–76.

[27] A significant number of scholars of the late Middle Ages and Enlightenment–including Duc de Sully, Crucé, E. Abbé de Saint-Pierre, Rousseau, J.-J. Kant, I. and Penn, W.–envisaged the preservation of peace in a similar way, within the framework of an organization. However, the first collective security organization, the League of Nations, was established only after World War I. The Covenant of the League of Nations was

technique to maintain or restore international peace and security, and to prevent or suppress unlawful forceful actions. It is based on the assumption that the most expedient means of safeguarding peace is deterrence, that is to say, if any potential aggressor acting in a rational manner faces–preferably as early as in the preparatory stage of his attack–the overwhelming force of the entire centralized collective security system, and as such, inevitable defeat.[28] Collective security, however, demands a great deal of sacrifice from participating states in exchange of benefits offered. The effective functioning of such system entails the fulfilment of several subjective and objective requirements. From a subjective point of view it necessitates loyalty, confidence, responsible policy-making, positive commitment, impartiality and even-handedness from members with a view to deter or repel an aggressor, whoever that might be. It also calls for recognition of interrelatedness and interdependence, partial surrender of freedom of action, subordination of national interest to public good, and renunciation of unilateral use of force. Collective security, furthermore, objectively requires the coexistence and active participation of several great powers of roughly equal strength, universal membership, economic vulnerability of members, general disarmament, along with an adequate legal environment, and a centralized institutional background capable of operating the system and realizing its goals.[29] Thus in the concept of collective security "security represents the end; collective defines the nature of the means; system denotes the institutional component".[30]

In the past six decades collective security has been embodied and institutionalized by the United Nations. The Security Council contributes to the functioning of collective security by means of exercising its powers in line with

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promulgated in Hungary by Act No. XXXIII of 1921 on the promulgation of the Treaty of Peace with the United States of America, the British Empire, France, Italy and Japan, and Belgium, China, Cuba, Greece, Nicaragua, Panama, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, and Czechoslovakia, signed at Trianon, on 4 June 1920.

[28] A system of collective security should not be mistaken for an alliance based on the principle of collective defence. The former has universal membership, and is directed against an abstract aggressor emerging within the system, while the latter is characterized by limited membership embracing like-minded states and a specific external enemy.

[29] See Claude, I. L., Jr.: *Swords Into Plowshares: The Problems and Progress of International Organization.* Third, revised edition. New York, 1964. 229–238. See also Basdevant, M.: La sécurité collective. *L'Organisation de la Paix* 5–7 (1936), 9–36; Delbrück, J.: Collective Security. In: Bernhardt, R. (ed.): *Encyclopedia of Public International Law. Vol. 3. Use of Force, War and Neutrality, Peace Treaties.* Amsterdam–New York–Oxford, 1982. 104–114; Kelsen, H.: Collective Security and Collective Self-Defense Under the Charter of the United Nations. *American Journal of International Law* 42 (1948), 783–796.

[30] Claude: *op. cit.* 223. (Italics omitted.)

the division of organizational labour. Being part of the system, each and every activity it performs serves either directly or indirectly the achievement of the official organizational goals, although as a result of the division of labour, its own objectives are limited and inferior to the overall organizational goals– hence there is a part-whole relation between the two categories. What are the official goals of the Security Council? There is no provision in the Charter under such heading, but the determination of tasks as contained by Article 24 might as well be considered as goal-setting. This article reads:

> "1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
>
> 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."[31]

To put it briefly, under the chapters listed in paragraph 2, the Security Council contributes to the peaceful settlement of international disputes, and may investigate any dispute or situation, which might lead to international friction or give rise to a dispute, and recommend appropriate procedures or methods of adjustment. In exercise of its nearly absolute power of discretion, it has an exclusive right to determine the existence of any threat to the peace, breach of the peace, or act of aggression, and to make recommendations, adopt provisional measures, or take enforcement measures not involving the use of armed force, or give authorization to the use of military force with a view to suppress such situations. The Council may even decide to utilize regional arrangements or agencies in the course of taking enforcement measures if it deems that appropriate.[32] (The Council, however, no longer exercises its Chapter XII powers owing to the termination of the trusteeship system. Furthermore it seems to carry out its duties under Article 26 concerning disarmament only in part, given that the overwhelming majority of successes on this field have not been achieved as a result of its work.[33])

[31] Charter of the United Nations, Art. 24.

[32] See *ibid.* Arts 33–34, 36–38, 39–42 and 53.

[33] *Ibid.* Art. 26: "In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and

Bearing all that in mind, the official goals of the Security Council can be summarized as follows. First, by contributing to the peaceful settlement of disputes it seeks to prevent the emergence of crises involving a threat to or a breach of the peace. Second, the Council attempts to ensure the rapid suppression of actions amounting to a threat to or a breach of international peace and security by resorting to methods it considers suitable, regardless to whether these actions occur within or between states. Third, once the situation has been normalized, the Council strives to maintain peace by adequate procedures. It may be observed that the triad of "prevention–suppression–maintenance" perfectly matches the first and most important purpose of the organization as laid down in Article 1, paragraph 1. For that reason, the Council can rightly be qualified an institutional depositary of collective security, notwithstanding its responsibility for the maintenance of international peace and security being primary, but admittedly not exclusive.[34]

The operative goals of the Security Council are understandably in harmony with official goals, although in the past six decades the body has also pursued objectives that can hardly be derived from the text of the Charter. Without intention to be exhaustive, the following operative goals can be exposed by examining the practice of the Council: to avoid direct confrontation of great powers at any cost; to settle crises not involving a direct confrontation of great powers as rapidly as possible; to apply enforcement measures in a pragmatic fashion; to delay or omit the taking of enforcement measures against unpredictable regimes; to refrain from serving selfish interests of great powers; to impede organizational action in case of disagreement among permanent members; to provide a forum for discussion of the most pressing issues of international peace and security, and thereby to enable a partial release of tensions; to develop innovative solutions in order to overcome various legal and practical anomalies, obstacles and challenges; to limit publicity whenever it would be inconvenient; to fiercely protect its special powers *vis-à-vis* other

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economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Art. 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments." See Prandler, Á.: *Az ENSZ Biztonsági Tanácsa* [The U.N. Security Council]. Budapest, 1974. 156.

[34] "The responsibility conferred [upon the Security Council] is »primary«, not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Art. 24, »in order to ensure prompt and effective action«." Certain Expenses of the United Nations (Art. 17, Paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, 163. (Insertion mine.)

principal organs; and to preserve its geopolitical influence and authority.[35] (It should not be forgotten that these are the operative goals of the Security Council as an organizational unit. Unofficial goals of Council members, as indicated by the fifth element of this enumeration, form a distinct category. The occasional and harshly criticized idleness of the Council is a consequence of individual goals and interests of members as reflected by their respective votes rather than the goals of the body itself. The relevant operative goal of the Council is merely to resist the organizational reception of certain individual goals in absence of a minimum agreement of its members.)

The effectiveness of the Security Council needs to be scrutinized in the context of the aforementioned goals. But as the vagueness of these goals leave room for divergent interpretations and their achievement requires continuous performance, the degree of goal attainment is extremely hard to establish.[36] The next phase of analysis, therefore, implies the elucidation of indicators of effectiveness, that is to say, signs unequivocally revealing the existence or absence of success of activities.

III.

A little simplification facilitates the formulation of the fundamental question pertaining to the examination of effectiveness: How can collective security be measured? Which indicators signify whether or not the Security Council as depositary of collective security has achieved its objectives?

Should the system of collective security be declared effective only if it eliminates the risk of violent crisis once and for all? Discord is an inevitable part of life in every group of people, thus the possibility of violence is an intrinsic feature of relations both within and between human communities. Naturally it does not necessarily mean that the actual eruption of hostilities is predestined. But an overly intensive clash of interests, or a failure or deliberate rejection of peaceful settlement mechanisms may easily render conflict resolution by civilized means, and as a result, the prevention of breaches of the peace impossible. Even if it occurs, it should not be seen as a fault of the collective

[35] Innovative solutions mentioned in the enumeration above include, for instance, the practice of authorizations to use force, the creation and development of peacekeeping, the establishment of international criminal tribunals, and the introduction of sanctions against individuals, legislation and alternative forms of consultation.

[36] Measuring effectiveness is more difficult if the organization has a permanent goal. See Etzioni: *op. cit.* 21.

security system. Prevention by peaceful dispute settlement is but one of the elements of collective security, the failure of which is not only anticipated by the system–that envisages the implementation of other procedures in such cases–but also constitutes the primary reason for its existence. A perpetual elimination of international and non-international crises posing threat to peace is, consequently, an inapplicable standard for the measurement of effectiveness of a collective security system. Success in absolute terms might be imaginable in a utopia, but is inconceivable in a world of states.

If the absolute absence of violent crisis cannot be utilized as indicator of effectiveness of collective security, could relative success serve as such? As commonly known, the frequency of international armed conflicts drastically decreased after World War II as compared to the previous era.[37] Somewhat shadowed by an alarmingly high number of non-international armed conflicts, which may likewise seriously threaten international peace, this delightful tendency begs the question as to what extent this decrease can be attributed to the functioning of the collective security system. It is difficult to give a definitive answer, because the behaviours and decisions of states are shaped by numerous considerations. The deterrent effect of enforcement actions of the Security Council to some extent undeniably contributes to the significant decrease of the number of international armed conflicts. From this point of view, the system does work effectively. Equally undisputable is the fact, however, that it is not the only reason why states tend to avoid direct military confrontation since the end of World War II. The deep internalization of the comprehensive prohibition of the use of force, the strength of the enemy, or the expected reaction by domestic or international public opinion sometimes can have as much, if not more, restraining force as an enforcement action taken by the Council, and hopefully implemented by member states. The low frequency of international armed conflicts, therefore, only partially indicates the effectiveness of collective security. (This "indicator" certainly fails to reveal the effectiveness of management of non-international conflicts, although they also come under the scope of the system.)

Having that in mind, in appears more expedient to focus our investigation on activities of the Security Council aimed at the maintenance or restoration of international peace and security rather than the sheer number of conflicts. Between 17 January 1946 and 30 June 2006 the Council has held 5,481 meetings, and passed 1,693 resolutions. The quantity of official meetings and numbered resolutions, however, does not provide a clear picture of the actual volume of

[37] See A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, U.N. Doc. A/59/565, para. 11.

work. As have been mentioned in passing with regard to operative goals,[38] the Security Council has developed certain "alternative" forms of consultation besides official meetings. The most important among these are perhaps informal consultations held in private with the exclusion of both the public and other members of the organization. Even though these consultations officially do not even qualify as meetings, and have neither statutory basis nor numbers, members are inclined to use them to revise previous decisions or enforcement measures, to discuss issues related to peacekeeping, to hear reports, or for any other purposes. No records are made at informal consultations, but with a view to secure a minimum amount of transparency, the president habitually holds informal briefings to other member states "on behalf of members of the Security Council" as opposed to official meetings after which he makes statements "on behalf of the Security Council". Evidently informal consultations also provide an opportunity for making decisions, yet these cannot be classified as resolutions and their legal nature is subject to debates.[39] The significance and practical weight of informal consultations is well illustrated by the fact that their number markedly surpassed that of official meetings in every year in the period between 1990 and 2000.[40]

It is also worth noting that a variety of other consultations exist involving one or more members of the Security Council. These consultations include, for example, meetings of caucus groups (permanent members, western permanent members, European Union member states, or non-aligned countries), contact groups or groups of friends as well as meetings with troop contributors, "Arria formula" meetings with other member states or third parties, and "Somavía formula" meetings with the participation of non-governmental organizations.[41]

The number of resolutions cannot measure the true performance of the Security Council either for two main reasons. First, several decisions assume a form other than a resolution and appear, for instance, in presidential statements or communiqués. Second, under special circumstances even the rejection of a draft resolution can promote the effective functioning of the system of collective security. In this case there is no perceptible output, nevertheless the

[38] Cf. *supra* note 35.

[39] See Bailey, S. D.–Daws, S.: *The Procedure of the Security Council.* Third edition. Oxford, 1998. 61–68.

[40] See Table on Number of Security Council Meetings and Consultations: 1988–2002. (B. Holt, K. Muller *et al.* prep.) at http://www.globalpolicy.org/security/data/secmgtab.htm.

[41] See Bailey–Daws: *op. cit.* 68–75. The number of official meetings neither reflects the volume of work within sanctions committees functioning as "committees of the whole". See *ibid.* 365.

idleness of the Council–once again, exceptionally, not as a general rule–may advance international peace and security. (*Horribile dictu*, it is partly due to the idleness of the Security Council brought about by lack of unanimity of its permanent members that the already tense relations of opposing blocs had not deteriorated further during the Cold War.)

Consequently, one needs to take into consideration indicators better suited to measure effectiveness in addition to figures relating to official meetings and resolutions, such as the number of resolutions adopted under Chapter VII of the Charter, the rate of occurrence of non-armed and armed enforcement actions as well as relevant statistical data concerning peacekeeping missions.

From among Security Council resolutions passed between 17 January 1946 and 30 June 2006 as many as 367 were adopted with respect to threats to the peace, breaches of the peace, and acts of aggression: 324 resolutions contain an explicit reference to Chapter VII, whereas the remaining 43 resolutions merely determine the existence of a treat to the peace, a breach of the peace, or an act of aggression without expressly referring to the chapter itself.[42] In these resolutions the Council has taken enforcement actions not involving the use of force against states, entities or individuals in the wake of several grave crises often affecting more than one country.[43]

The Security Council had authorized the use of force only on two occasions during the Cold War; however, the frequency of such actions has remarkably increased subsequent to the downfall of the bipolar world. Hence by mid-2006 the Council has deemed the use of military coercion necessary with regard to more than a dozen conflicts.[44] (It should be noted that the number of crises is definitely not equal to the number of resolutions containing enforcement

[42] See Johansson, P.: *UN Security Council Chapter VII Resolutions, 1946–2002: An Inventory*. Uppsala, 2003. The number of Chapter VII resolutions adopted between 1 January 2003 and 30 June 2006 was established by the author. Figures indicated do not contain resolutions that merely refer to a Chapter VII resolution, but contain neither an express nor an implied reference to that chapter.

[43] During the period under consideration, enforcement actions not involving the use of force has been taken in Afghanistan, Angola, Côte d'Ivoire, the Democratic Republic of the Congo, Ethiopia and Eritrea, Haiti, Iraq, Liberia, Libya, Rwanda, Sierra Leone, Somalia, South Africa, Southern Rhodesia, Sudan, and the former Yugoslavia. Cf. http://www.un.org/News/ossg/sanction.htm.

[44] During the period under consideration, the Security Council has authorized the use of force in Afghanistan, Burundi, Côte d'Ivoire, the Democratic Republic of the Congo (and formerly in Eastern Zaire), Haiti, Iraq, Korea, Lebanon, Rwanda, Sierra Leone, Somalia, Southern Rhodesia, Timor-Leste, and the former Yugoslavia. (Depending on interpretation, Liberia and Sudan may be added, as well.)

measures. The Security Council has passed countless resolutions pertaining to each crisis, and sometimes decided to take armed or non-armed enforcement actions more than once. It has to be emphasized also that certain resolutions leave room for divergent interpretations or classifications, so the aforementioned statistics may slightly deviate from data originating from other sources.[45])

The United Nations has established sixty peacekeeping missions in more than forty countries of five continents between 29 May 1948 and 30 June 2006.[46] The overwhelming majority of these operations were dispatched by the Security Council, while only two missions were set up by the General Assembly.[47] As of the last day of the period under consideration, fifteen peacekeeping missions has been in operation in addition to twelve special political and peacebuilding missions directed and supported either by the Department of Peacekeeping Operations or the Department of Political Affairs. The total number of personnel serving in the ongoing fifteen peacekeeping missions has been 87,707, whereas the number of personnel serving in special political and peacebuilding missions has amounted to 2,256. Altogether 109 member states of the organization have so far contributed with uniformed personnel to the success of peace operations, and the estimated total cost of these operations has exceeded 41 billion dollars.[48]

These figures indeed speak for themselves; still they do not reflect the actual effectiveness of measures of the Security Council. A handful of commonly known and clear-cut cases apart, such as the success in Cambodia or the tragedy in Rwanda, the practical effectiveness of enforcement measures and peacekeeping operations are subject to divergent assessments. It has occurred time and again that the Council, the affected state, the members of the inter-

[45] For example, some authors maintain that the Security Council has authorized the use of force also in Albania, the Central African Republic, and Guinea-Bissau. Cf. Blokker, N.: Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing". *European Journal of International Law* 11 (2000), 544.

[46] See http://www.un.org/Depts/dpko/dpko. This figure does not contain missions authorized by the Security Council, but functioning outside the auspices of the United Nations, such as Kosovo Force (KFOR), International Security Assistance Force (ISAF) or Operation Artemis.

[47] These two missions were the United Nations Emergency Force I. (UNEF I.) and the United Nations Security Force/United Nations Temporary Executive Authority (UNSF/UNTEA). Cf. Bothe, M.: Peace-keeping. In: Simma: *op. cit.* 587–588.

[48] See United Nations Peacekeeping Operations. Peace and Security Section, United Nations Department of Public Information, July 2006, DPI/1634/Rev. 61; United Nations Political and Peacebuilding Missions. Peace and Security Section, United Nations Department of Public Information, July 2006, DPI/2166/Rev. 36.

national community and the public opinion have evaluated the achievements of a given action in a contradictory manner.[49] With the success of suppression of crises being in most instances relative, and the results of conflict prevention and maintenance of peace being intangible, one may hardly answer the question pertaining to the effectiveness of the Security Council with a definitive "yes" or "no".[50]

Nonetheless, in the light of achievements it can be plausibly stated that the prevailing structure and working methods of the Security Council are equally adequate for the attainment of organizational goals, that is to say, the body is *perfectly capable of effective functioning* even as it is–with existing objective limitations, of course, such as the absence of agreements under Article 43 of the Charter.[51] A continuous and systematic utilization of this capability depends exclusively on the willingness of Council members as well as states and international organizations obliged or requested to implement its decisions. Neither the current structure nor the working methods of the Security Council hamper effective functioning: the real obstacle emanates from subversive unofficial operative goals and political interests of states. Restructuring and reorganization of work are, therefore, not inescapable preconditions of increasing effectiveness– this objective could be achieved simply by enhancing the willingness of states participating in the making or the implementation of decisions in some other

[49] In absence of universally applicable indicators of effectiveness, differences in the determination of the degree of goal attainment are fairly common in the world of organizations. In addition, the more complex an organizational goal is the more difficult the measuring of effectiveness becomes. See Hall: *op. cit.* 98-103. As regards public opinion, it can be stated that "people's attitudes toward the United Nations and other international organizations tend to be associated with their beliefs (1) as to the extent to which such organizations affect their own and other nations, and (2) whether the observed or imagined effects are »good« or »bad«." Sprout, H.–Sprout, M.: *Foundations of International Politics.* Princeton, 1962. 569.

[50] For a similar opinion concerning the entire organization, see Seidel, G.: Ist die UN-Charta noch zeitgemäß? *Archiv des Völkerrechts* 33 (1995), 22. Nevertheless, the High-level Panel admitted that the effectiveness of the Council has increased since the end of the Cold War. See A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, U.N. Doc. A/59/565, para. 246. See also Higgins, R.: Peace and Security: Achievements and Failures. *European Journal of International Law* 6 (1995), 445–460.

[51] Charter of United Nations, Art. 43, paragraph 1: "All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security."

way. (It might be added that new states are apparently keen on joining the United Nations, which arguably indicates a somewhat firm belief in the effectiveness of the collective security system.)

IV.

Since arguments pertaining to the increase of effectiveness of the Security Council do not necessarily justify calls for reform, one may raise the question as to what other circumstances could render a comprehensive restructuring so imperative. Could a fundamental change of organizational environment provide sufficient basis for reform proposals?

The Security Council was designed during World War II on the basis of international relations and potential threats of that period. Accordingly, the founders were chiefly guided by a desire to prevent the recurrence of a world war, to establish an effective mechanism for the suppression of interstate conflicts and to preserve the contemporaneous *status quo* when they drafted the structure, powers and procedure of the Council. The principal organ created under the sign of the "One World" paradigm, however, had never had the opportunity to operate under circumstances originally imagined – instead, it had to face the realities of Cold War as early as at its second meeting.[52]

The environment once again changed with the downfall of the bipolar world, when a network of previously unknown or underestimated threats and challenges has emerged. The collapse of the Soviet bloc brought about the end of a delicate balance of power, but the sole remaining superpower has soon proved to be incapable and unwilling to guarantee world peace even with the support of its allies. The disappearance of great power domination over small states in former zones of influence has led to the surfacing of hitherto contained tensions of ethnic, economic, territorial or other nature, and paved the way to the eruption of violent conflicts involving fatalities and flows of refugees on a scale of millions. Partly in relation to these conflicts grave violations of human rights and transnational organized crime, particularly arms trade, drugs trafficking and money laundering, have become alarmingly frequent. By the turn of the millennium international terrorism as well as proliferation of weapons of

[52] Cf. *Repertoire of the Practice of the Security Council, 1946–1951.* New York, 1954. 300–301. On changes of paradigm in international relations in the second half of the 20th century, see McWhinney, E.: *The United Nations and a New World Order for a New Millennium. Self-determination, State Succession, and Humanitarian Intervention.* The Hague–London–Boston, 2000. 3 *et seq.*

mass destruction backed both by authoritarian regimes and terrorist organizations has also grown to be a burning issue. Serious challenges have likewise arisen from problems of the Third World, unequal distribution of global wealth, exploitation of natural resources, extreme poverty, famine, water shortage, and various diseases, all of which continuously reproduce the sources of conflicts unless taken care of by adequate measures. Finally, even positive phenomena, such as the rapid development of technology, globalization or increasing economic interdependence, may clearly entail security hazards.[53]

According to Secretary-General Kofi Annan's High-level Panel on Threats, Challenges and Change one of the principal tasks for any reform of the Security Council is to enhance its capacity and willingness to act in the face of new threats.[54] Before one would unreservedly accept this statement, it is worth briefly examining as to what extent this task is necessary. Although the Security Council was primarily constructed to deal with interstate conflicts, the founders were completely aware of that it would function in a dynamically changing environment. In order to ensure prompt and effective settlement of situations endangering international peace and security, the Council was endowed with an exceptionally broad, nearly absolute power of discretion. Its authority is restrained by the following three sets of rules only: the peremptory norms of international law, the Charter of the United Nations, and its own Provisional Rules of Procedure.[55] This virtually absolute power enables the Council to take action straight away against any new threat or challenge in a manner it deems fit.[56]

The opinion of the High-level Panel calls for supplementary remarks concerning willingness, as well. Namely, occasional reluctance from resolute action stems from subversive unofficial operative goals of members rather than any structural defect of the Security Council itself. As commonly known, the collective will of that organ is established as an aggregate of individual wills of

[53] See We, the Peoples: The Role of the United Nations in the 21st Century. Millennium Report of the Secretary-General, 3 April 2000, U.N. Doc. A/54/2000, para. 5, 31–40, 66–75, 189–197; A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, U.N. Doc. A/59/565, para. 11–23; In Larger Freedom: Towards Development, Security and Human Rights for All. Report of the Secretary-General, 21 March 2005, U.N. Doc. A/59/2005, para. 6–11, 76–86.

[54] A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, U.N. Doc. A/59/565, para. 248.

[55] See Provisional Rules of Procedure of the Security Council, U.N. Doc. S/96/Rev. 7.

[56] In a similar manner, see G.A. Res. 60/1, 8th plen. mtg., 16 September 2005, U.N. Doc. A/RES/60/1, para. 79.

members in line with Article 27 of the Charter.[57] The Council is "willing" to act only if at least nine of its members, acting on behalf of every member state of the organization, are willing to act and neither permanent member dissents. Otherwise the Council will be paralyzed.[58] Hence the containment of threats and challenges emerging at the turn of the millennium could be secured without the restructuring of the Security Council–only the motivational deficiencies of members need to be remedied, as already mentioned. (The reform might nevertheless serve as sufficient motivation for states, but it has nothing to do with organizational environment.) In sum, owing to its exceptionally broad powers, the Council is capable of taking effective action against any traditional or new threat or challenge provided that its members are willing to cooperate. The fundamental change of organizational environment, therefore, does not provide an acceptable explanation for the necessity of reform.

Since the Security Council is theoretically capable of effective functioning even in the prevailing environment, one has to address the question whether power struggles within the United Nations could possibly substantiate reform. As already mentioned, the responsibility of the Security Council for the maintenance of international peace and security is primary, but not exclusive. Owing to its general competence as well as "early warning" and preventive functions, respectively, the General Assembly and the Secretary-General are likewise involved with this particular subject.[59] Similarly to other organizations, specific responsibilities of principal organs of the United Nations have given rise to different sub-unit interests, the conflict of which has at times brought about fierce power struggles. (Suffice it to recall debates surrounding the "Uniting for Peace" resolution.[60]) Given that the relevant powers of the Council are exclusive, these conflicts actually do not affect its effectiveness. In

[57] Charter of the United Nations, Art. 27: "1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Art. 52, a party to a dispute shall abstain from voting."

[58] The failure of certain draft resolutions is a normal phenomenon in the conduct of business that can barely be labeled as a shortcoming. The veto cannot be qualified a deficiency either, as it is essential for the achievement of the dominant operative goal: the avoidance of direct confrontation of great powers.

[59] See Charter of the United Nations, Arts 10–12 and 99.

[60] G.A. Res. 377A, 302nd plen. mtg., 3 November 1950, U.N. Doc. A/RES/377A (V).

other words, power struggles within the organization at most justify minor adjustments in the relationship of organs concerned, but fall short of substantiating a comprehensive reform of the Security Council.

Last, but not least one should examine whether some regularly criticized features of the Council–namely lack of representativeness, undemocratic decision-making and absence of transparency–may plausibly necessitate reforms. It is easy to comprehend that in order to be able to fulfill its responsibilities in a timely and effective manner, the Council *must* be reasonably small, and due to the political sensitiveness of its decisions, it *must* work in private to some extent. In consequence, the lack of representativeness, undemocratic decision-making and absence of transparency all stem from the special responsibility of the Council, that is, the maintenance and restoration of international peace and security. These features by themselves do not undermine effectiveness–on the contrary, from a certain point of view they are the very basis thereof. They constitute the price of participation in the strictly centralized collective security system. Sovereign members of the system, however, are willing to "pay" that price only in so far as they are satisfied with benefits received. If the Security Council carried out its duties with absolute effectiveness and to the contentment of every member state, the features in question would hardly be an issue of such gravity. But as the effectiveness of the Council significantly oscillates in practice (despite that it is capable of maximum effectiveness), quite a few member states–particularly disappointed subjects of failed crisis management activities, principal financial and troop contributors as well as states that merely perceive an opportunity for a reallocation of power within the organization–consider the "price" intolerable, and prove reluctant to recognize the authority of such oligarchic body of doubtful effectiveness. Even though failures of the Council are chiefly caused by their own indolence (negative votes, denial of cooperation), unsatisfied states urge reforms: invoking the Council's lack of representativeness and transparency and its undemocratic decision-making, they demand deeper involvement in the making of decisions and insight into the confidential details of work. Their frustration may weaken the authority of the Security Council, decrease the willingness of member states to implement its decisions, and ultimately, it may further reduce the chance of successful goal-attainment.[61] Features that were originally meant to guarantee effectiveness are thereby transformed into obstacles in the way of effectiveness requiring

[61] On authority and execution of authoritative communications in formal organizations, see Barnard: *op. cit.* 163, 166. It is noteworthy that members of voluntary organizations with poorly defined objectives tend to have the narrowest range of acceptance of authority. Simon: *op. cit.* 134. The United Nations is such an organization.

comprehensive reforms. (Negative public opinion works in a more or less similar fashion, although it exerts destructive effects on the organization through the medium of member state governments tracking the general attitude of voters rather than directly.)

We have thus reached the genuine reason of Security Council reform, which is to sustain membership involvement. It appears that the necessity of reorganization arises not as a result of the Council's alleged incapacity of effective functioning or facing new challenges of the post-Cold War era. It is neither indispensable on account of lack of representativeness, undemocratic decision-making or absence of transparency. *The reform of the Security Council is necessary because the majority of member states, acting upon divergent considerations, demands modifications.* These claims are expressed both within and outside the organization. Accordingly, even though power struggles between the General Assembly and the Security Council cannot objectively substantiate reform proposals, the immense political pressure of members within the framework of the plenary organ might prove sufficient for coercing changes. This struggle has been going on for decades, although its intensity has varied with the alteration of political environment.[62] The pressure remarkably increased by the end of the Cold War: the General Assembly has been continuously keeping the issue on its agenda since 14 December 1979,[63] and adopted a number of resolutions since 11 December 1992,[64] what is more, on 3 December 1993, it has established an Open-ended Working Group to consider all aspects of the question of Security Council reform.[65] Hitherto the Council has been able to withstand the pressure of the General Assembly. It has created its own Informal Working Group to identify desirable changes in the practice of documentation and other procedural questions, and conspicuously strives to introduce any adjustments not requiring an amendment of the Charter of its own accord.[66] Interestingly enough, these measures not only illustrate the ability of the Council to resist changes, but also reveal the limited nature of

[62] The General Assembly had urged the restructuring of the Security Council as early as late 1959. G.A. Res. 1404, 843rd plen. mtg., 25 November 1959, U.N. Doc. A/RES/1404 (XIV).

[63] G.A. Dec. 34/431, 104th plen. mtg., 14 December 1979. See also Bailey–Daws: *op. cit.* 383; Fassbender, B.: *UN Security Council Reform and the Right of Veto: A Constitutional Perspective.* The Hague–London–Boston, 1998. 221.

[64] G.A. Res. 47/62, 84th plen. mtg., 11 December 1992, U.N. Doc. A/RES/47/62.

[65] G.A. Res. 48/26, 69th plen. mtg., 3 December 1993, U.N. Doc. A/RES/48/26.

[66] See e.g. Note by the President of the Security Council, 19 July 2006, U.N. Doc. S/2006/507.

that ability. Therefore, it remains to be seen how long the Council can and will endure under the mounting pressure.

Certain states demanding reform of the Security Council are undeniably guided by an earnest desire to increase effectiveness. Others rather wish to gain broader control over their resources placed at the disposal of the organization, while still others merely seek to acquire a position within the organization that corresponds to their perceived political or economic weight. Reform proposals, consequently, originate from various individual and highly subjective interests rather than objective factors. (It also excellently portrays how reform as an unofficial operative goal of selected members is converted into an operative goal of the entire organization. The reception of this goal by the organization has been admittedly facilitated by the fact that adequately communicated measures taken in the general direction of reform may contribute to the temporary preservation of organizational legitimacy even without significant achievements.) Since the United Nations is a voluntary organization,[67] it cannot ignore the demands of its members, irrespective of the degree to which these are justifiable. If member states require reforms, the organization–in order to secure its survival[68]–must attempt to fulfill this requirement even if the problems with which members try to substantiate their aspirations primarily emerge as a result of low membership involvement rather than any critical structural defect of the principal organ under consideration. It has to be emphasized once again that the Security Council would be an appropriate means to reach its specific organizational goals as it is, if members of the United Nations did not condemn it to idleness by frequently obstructing its work or declining sufficient assistance for its actions out of sheer self-interest.[69]

The founders of the organization not only anticipated the need of changes to arise in the future, but also the likely behaviour of member states. For that

[67] See *supra* note 2.

[68] The theory of organizational equilibrium holds that members of an organization are both positively and negatively motivated to participate in the organization. The former represents the benefits provided by the organization to its members, while the latter symbolizes the contribution of members to the co-operation within the organization. Members participate in the organization until their benefits originating from membership outweigh their contributions. Thus the organization can endure only as long as it is able to transform incoming contributions into benefits, and redistribute them to members in a satisfactory manner, thereby ensuring their continuous participation and further contributions. Cf. Barnard: *op. cit.* 56–59.

[69] "An international or regional organization's impotence is always the result of its members' policies." Hoffmann, S.: Thoughts on the UN at Fifty. *European Journal of International Law*, 6 (1995), 322.

reason, President Harry S. Truman had addressed the following solemn instructions to delegates on the occasion of signing the Charter of the United Nations:

> "You have created a great instrument for peace and security and human progress in the world. The world must now use it! If we fail to use it, we shall betray all those who have died in order that we might meet here in freedom and safety to create it. If we seek to use it selfishly–for the advantage of any one nation or any small group of nations–we shall be equally guilty of that betrayal. The successful use of this instrument will require the united will and firm determination of the free peoples who have created it. The job will tax the moral strength and fibre of us all."[70]

Conclusions

The reform of the Security Council had been anticipated by the founders of the United Nations as a normal and inevitable event in the life of the organization. Even though efforts aimed at comprehensive restructuring are coeval with this unique body, the turn of the millennium has witnessed a significant increase of critical voices and a strengthening of calls for reform.

The declared objective of reform proposals is to enhance the effectiveness, in other words, the degree of goal-attainment of the Security Council. A careful investigation of organizational goals and relevant practice, however, reveals that a definitive statement concerning the effectiveness or ineffectiveness of the Council can hardly be formulated as its record comprises both tragic failures and outstanding achievements. At any rate, these achievements indicate that the Council is capable of effective functioning even in its current form, thus neither its prevailing structure nor its working methods unavoidably hamper the attainment of organizational goals. The real obstacle in the way of maximum effectiveness emanates from subversive unofficial operative goals and interests of members, not from the current establishment. Hence a radical reorganization of the Security Council both in terms of structure and working methods is not an inescapable precondition of enhancing effectiveness, and in consequence, such arguments do not plausibly justify reform proposals.

The fundamental change of organizational environment that occurred after the end of the Cold War likewise fails to substantiate the need for reform because

[70] Address by the President of the United States of America at the Closing Plenary Session of the United Nations Conference on International Organization, San Francisco, 26 June 1945. U.N.C.I.O. Docs, Vol. I, 716.

the Council has remained perfectly capable of taking prompt and effective action against any traditional or new threat or challenge by relying on its exceptionally broad powers and vast inventory in the field of maintenance or restoration of international peace and security–provided, of course, that its members are sufficiently motivated. Similarly, power struggles between the General Assembly and the Security Council as well as certain intrinsic features of the Council–namely lack of representativeness, undemocratic decision-making, and absence of transparency–cannot convincingly explain the necessity of comprehensive reform either.

It appears that reform proposals are rooted in various individual and highly subjective interests rather than objective circumstances. Therefore, the reform of the Security Council is necessary simply because the majority of member states, acting upon divergent considerations, demands modifications. Since the United Nations is a voluntary organization, it cannot ignore the demands of its members. In order to secure continuous membership involvement, and thereby its very survival, the organization must attempt to fulfill these demands even if the problems with which member states try to substantiate their aspirations primarily emerge as a result of their own indolence, not as a result of critical structural or procedural shortcomings of the Security Council.

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CSONGOR KUTI*

Post-communist Property Reparations: Fulfilling the Promises of the Rule of Law?

Abstract. Property reparation programs undertaken in Central and Eastern Europe after the fall of the communist regimes fail to fulfill 'the promises of the rule of law'. Reparation schemes do not have an exclusively reparative nature, moreover, reparation was deliberately linked with structural reform, and due to this duality, the scheme features a mixed distributive-reparative character. This resulted in two troublesome aspects: on one hand, there is no evidence of a compelling argument, which justifies the mitigation of past property deprivations at large. On the other hand, it can not be satisfactorily demonstrated why property-related injustices enjoy a privileged status when it comes to reparations, in comparison to other types of losses. Further, bearing in mind the Hayekian objection towards distributive justice, even those who had been placed in an equal situation–i.e. all suffered past property injustices–are not offered an objectively equal opportunity to claim redress. Due to the fact that the schemes addressed reparations–at least in part–from a distributive perspective (which resulted in an attempt to create a substantive equality between victims), the result that they achieved was objective inequality, as everyone was entitled to reparation between the same limitations, while everyone suffered losses of different extent. These differences in treatment between various former owners are mostly arbitrary, and in certain cases deliberately introduced so as to produce inequalities, and thereby meet the Hayekian concerns as far as they produce results that conflict with the idea of the rule of law. The analyzed provisions of the reparation schemes lead in practice to the creation of winners and losers of reparations, to a breach of the idea of formal equality before the law. In the conditions in which reparation schemes fall short from a thick conception of the rule of law (justice, rights or objective equality) it worth investigating, whether requirements of a thin reading–focusing on foreseability, clarity and consistency–are still met by post-communist property redistribution. Unfortunately at least under three aspects–valuation, time limits and probation–the reparation schemes' provisions are not beyond criticism. The complexity of tasks that transition societies had to face is obvious and uncontested. Transitional law, according to Teitel, is a sui generis paradigm, a vehicle of social, political and ideological transformation. The amendments to the rule of law ideal, justifiable in the context of transition can go as far as–for example–to allow governments to decide upon the concrete form of the reparation, the type of wrongs it want to address, the period in time intended to be covered. But they may not create winners and losers; they may not distinguish between those placed in the same situation.

Keywords: property, reparations, restitution, rule of law, justice, transitional law

* LL.M., S.J.D., obtained his degrees from Central European University Budapest, Hungary.
E-mail: csongi@excite.com

This paper analyzes the property reparation programs of post-communist Central and Eastern Europe from the perspective of the rule of law. It's central argument is that ultimately these schemes fall short from fulfilling what Skapska stylishly calls "promises of the rule of law."[1] Writing about the essence of the rule of law, Raz notes that law should be able to actually guide human conduct.[2] This view is nicely completed by Teitel, who argues that in periods of political upheaval, the rule of law serves to mediate the normative shift in justice. For natural lawyers, continues Teitel, the predecessor regime's immorality determines the necessity for a "fresh start", for the rule of law to be grounded in something else than adherence to the preexisting law.[3]

The commitment to processes that "allow property rights to be secure under legal rules that will be applied predictably [...] is the essence of the rule of law"–tells us Cass.[4] The question that arises than is: were reparation laws "good laws"? One must note that modern theories of the rule of law deny its moral features. Raz and Rawls speak about a legally good system, instead of a morally good one. Neumann adds that rational people need a predictable, not a fair system: "[w]e know that life is not fair and we plan our lives accordingly ... it matters not at all whether this unfairness is found inside or outside the courtroom, so long as it is predictable."[5] Moreover, law is essentially good, because there are good reasons to have law and be governed by it–adds Marmor.[6] At most, it might be argued that the rule of law–although representing basically functional values–also promotes additional goods (beyond functionality), such as impartiality, transparency etc., and these contribute to the popularity of the rule of law ideal.[7]

Unfortunately, post-communist reparation schemes are problematic exactly under the above-mentioned features, which are thought to be essential for the rule of law ideal. The argument starts with the idea that property reparation schemes do not have an exclusively reparative nature, moreover, reparation was deliberately linked with structural reform, and due to this duality, the scheme features a mixed distributive-reparative character. This, however,

[1] Skąpska, G.: Restitutive Justice, Rule of Law, and Constitutional Dilemmas. In: Czarnota–Krygier–Sadurski (eds.): *Rethinking the Rule of Law After Communism*. Budapest, 2005. 215.

[2] Raz, J: *The Authority of Law*. Oxford, 1977. 211–212.

[3] Teitel, R. G.: *Transitional Justice*. Oxford, c. 2000. 11–27.

[4] Cass, R. A.: *Property rights systems and the rule of law*. http://ssrn.com/abstract_id=392783, 2.

[5] Neumann, M.: *The rule of law: politicizing ethics*. Burlington, VT, 2002. 45.

[6] Marmor, A.: *The rule of law and its limits*. http://ssrn.com/abstract=424613, 53.

[7] *Ibid.* 10.

represents a real problem for the rule of law, as, according to Hayek's remark: "any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law." According to Hayek, the rule of law is inherently leading to economic inequalities, but this inequality is acceptable, until it is not deliberately produced, and until it consists in the differentiated treatment of the different persons, i.e. objective equality of opportunities is preferred to a subjective equality.[8]

Building on this finding, one of the essential requirements that reparation schemes have to live up consists in offering objectively equal opportunities to those placed in an equal situation. However, the various limitations that are placed on reparations (person-related, temporal, quantitative and property-based) betray concerns towards substantive equality, which in practice resulted in unjustified inequalities, producing arbitrary outcomes.

But even if one endorses a minimalist reading of the rule of law, proposed by Raz, according to which it needs not to produce just outcomes,[9] and accepts the functionalist view, which expects not more and not less than (reparation) laws to be predictable, coherent and consistent, may find that post-communist schemes fall short in some aspects (quantification, deadlines, evidence) from the requirements of a thin version of the rule of law too.

Before addressing the issue of limited reparations, the justness of the entire scheme has to be assessed. Starting from Raz's argument, according to which justice is an ideal distinct from the rule of law, completed with Radbruch's view of the relationship between these two ideals as an antinomy between two essential elements of legality,[10] it seems that this contrast is most difficult to deal with in regime change contexts.

One compromising attempt is represented by Teitel's argument, which maintains that in transitions, law's role itself is transitional and not foundational. Transitional jurisprudence's task is to bridge conventional legality and radical transformation. Which values prevail in this conflict–argues the author–are ultimately determined by particular historical and political legacies.[11] To these factors the–economical and political–interests of the emerging new elite can be added, even accepting the amendment that present interests are to some extent contingent upon the legacies of the past.

[8] Hayek, F.: The Road to Serfdom. *University of Chicago Press*, c1991. 59.

[9] Raz, J.: Rule of Law and Its Virtue. In: Cunningham (ed.): *Liberty and the Rule of Law*. Texas, 1979. 4.

[10] Radbruch, G.: *Rechtsphilosophie*. Heidelberg, 1987.

[11] Teitel: *op. cit.* 215.

More importantly, however, it can be argued, that while the above-enumerated elements determine the prevailing values of transition, the appropriateness of the choice is function of the effectiveness of the chosen value in fulfilling the envisaged objectives. In other words: if radical transformation is the order of the day, and all this is done in the name of justice, the outcome of the process should be demonstrably just. Otherwise, lofty principles of justice will serve only as facades to arbitrariness. But property reparation schemes feature two troublesome aspects from this point of view. On one hand, there is no evidence of a compelling argument, which justifies the mitigation of past property deprivations at large. On the other hand, it can not be satisfactorily demonstrated why property-related injustices enjoy a privileged status when it comes to reparations, in comparison to other types of losses.

The linking of property reparations with reforms resulted in two broad and distinct goals that were expected to be realized through reparations. On one hand, to compensate individuals for the property losses they suffered as a consequence of unjust governmental actions. On the other, to resettle property relationships so as to achieve certainty in possessions which was regarded as a precondition for the creation of an efficient market economy. The processes were generally envisaged as being guided by the principles of the rule of law.

Such is the case of Hungary, where property compensation had a declared social goal. Or, in Poland, the Constitutional Tribunal identified "a beneficial social aspect" of the compensation scheme dealing with the properties left beyond the Bug River.[12] Similar conclusion was reached by the Estonian Supreme Court,[13] arguing that "ownership reform was undertaken in public that is in general interests. Ownership reform is a specific task of the state in building up a rule of law state and a market economy." The Lithuanian Constitutional Court has managed to find some social goals in reparations too, arguing that "[t]he restoration of the rights to land has actually meant process of agrarian reform. [...] The restoration of the rights of ownership and land reform are inseparable processes. The restoration of the rights to land was the basic means for implementing of land reform."[14]

Contrary views have been voiced, for example, by the Czech[15] and the Latvian[16] courts, which both held that the goal of restitution laws is (reparative)

[12] K 2/04. Judgment of 15th December 2004, concerning the right to offset the value of property left in the former Eastern territories of Poland.

[13] Decision 3-4-1-10-2000, of 22 December 2000.

[14] On restoration of citizens' ownership rights to land, decision of 8 March 1995.

[15] I. US 38/02, judgement of 24 March 2004.

[16] Case No. 04-01(99), judgement of April 20, 1999.

justice, i.e. the rectification of past wrongs, without mentioning any related social aims. This statement of the Constitutional Court is especially interesting in the case of the Czech Republic, where commentators identified, at least at the moment of the adoption, additional purposes of reparations, alike those that were mentioned above. According to Cepl for instance, the new political elite considered restitution as helpful means in speeding up privatization and developing market economy.[17] However, it seems that by 2004 the Court managed to find a narrower ratio legis behind the restitution scheme.

According to Stephen Holmes, the economic rationale could fail out of consideration of efficiency: record-keeping was poor under communist administration, the judiciary is under-sized and under-educated, and promises to restore property in kind creates serious uncertainty in possessions.[18] Fact is that, for example, the Romanian restitution process generated about 1 million lawsuits[19] and as of 2007, the process has not been terminated. Albeit, argues Holmes, "even if restitution is both economically inefficient and morally unjust, it is good policy,"[20] because it helps legitimating the new property system, by preventing the former communist elite from appropriating (all) state assets. "Good policy," however, does hardly further the case of the rule of law.

Undoubtedly, by adding additional aims to property reparations, as land reform, establishing the preconditions of a market economy etc. a strong distributive aspect of reparations is created. Kutz notes, for instance, that because on one hand communist takings of property were generally maintaining a semblance of legitimacy, and on the other hand the communist regimes are 'off the stage', post-communist reparations are pushed towards a more distributive approach to compensation.[21]

The UN Human Rights Committee has stressed in the case of Somers v. Hungary, that objective compensation criteria of compensation have to be applied equally and without discrimination.[22] Patrick Macklem considers that

[17] Cepl, V.: A note on the restitution of property in post-communist Czechoslovakia. (7) *Journal of Communist Studies* 367, 1991, also quoted by Crowder, R. W.: Restitution in the Czech Republic: Problems and Prague-Nosis, (5) *Indiana International and Comparative Law Review*, 237.

[18] Holmes, Stephen in A Forum on Restitution: Essays on the Efficiency and Justice of Returning Property to Its Former Owners. *East European Constitutional Review*, 1993. 32.

[19] Verdery, K.: *The Vanishing Hectare: property and value in postsocialist Transylvania.* Ithaca, N.Y. 2003. 46.

[20] Holmes: *op. cit.* 33.

[21] Kutz, Ch.: Justice in Reparations: The Cost of Memory and the Value of Talk. (32) *Philosophy & Public Affairs*, 2004. 298.

[22] CCPR/C/57D/566/1993, Decision of 29 July 1996, para. 9.4.

this language is urging governments entertaining compensatory schemes to pay close attention to the demands of distributive justice.[23] The Hungarian Constitution Court recognized this a couple of years earlier, when it argued that the constitutionality of the compensation law has to be assessed on the basis of distributive justice, taking into consideration not merely the interests of the victims, but also the concurrent constitutional tasks.[24]

Turning to the two troublesome aspects mentioned above, the first fundamental question that needs an answer is whether communist takings of property demand reparations or not? Undoubtedly, Article 8 of the Universal Declaration of Human Rights creates a right to effective remedy for acts violating fundamental rights guaranteed by constitution or by law.[25] A similar provision is reiterated by the International Covenant on Civil and Political Rights.[26] Commentators note, however, that the scope and content of the right to redress is fuzzy and unclear, and it does not necessarily create an obligation to compensate every type of violation. Although a right to compensation is consistently recognized for victims of serious violations (such as torture, forced disappearance, extra-legal executions etc.).[27]

In addition, even if the major international documents, such as the Universal Declaration,[28] a protocol to the European Convention on Human Rights[29] or the European Union's Charter of Fundamental Rights[30] mention the right to property, none of them recognizes a right to restitution.

In the case of Somers v. Hungary, the UN Human Rights Committee held that the Covenant did not protect the right to property, and therefore "there is no right, as such, to have (expropriated or nationalized) property restituted." On the other hand, the Committee also noted, that the Covenant itself entered into force with respect to Hungary in 1976, and therefore the Hungarian state

[23] Macklem, P.: 1 Rybná 9 Praha 1: Restitution and Memory in International Human Rights Law. (16) *European Journal of International Law,* 2005. 10–11.

[24] HCC, AB 15/1993, 1543/B/1991.

[25] Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

[26] Art. 2 (3) of the International Covenant on Civil and Political Rights, G. A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

[27] Orentlicher, D. F.: Addressing Gross Human Rights Abuses: Punishment and Victim Compensation. In: Henkin and Hargrove (eds.): Human Rights: An agenda for the next century. *American Society of International Law,* 1994. 449.

[28] Universal Declaration of Human Rights. *op. cit.* art 17.

[29] European Convention on Human Rights, Protocol 1 Enforcement of certain Rights and Freedoms not included in Section I of the Convention of 20 March 1952, art. 1.

[30] Charter of Fundamental Rights of the European Union, 2000/C 364/01, art 17.

may not be held responsible under its provisions for facts that occurred before that date. A similar conclusion was reached by the European Court of Human Rights in the case of Jasiūnienė v. Lithuania, where the Strasbourg court refused to examine the nationalization of the claimant's land, on account of ratione temporis lack of competence.[31] At the same time, the Court stated that the Convention does not guarantee the right to restitution of property. This argument was repeated also in Rucińska,[32] and refined in Broniowski.[33] Neither the hope that long extinguished property rights may be revived, nor a conditional claim which has lapsed as a result of failure to fulfill the condition, can be regarded as 'possession', in the meaning of the Convention and its Protocol No.1. Albeit even if there is no clear-cut standard for property restitution in international law, the obligation of successor regimes to repair the wrong done by their predecessor is unequivocally formulated.[34] Moreover, it may also be invoked that general principles of international law also assert the requirement of prompt, adequate and effective compensation for the expropriation of property. But in James and others, the European Court of Human Rights pointed out that the principles in question apply exclusively to non-nationals, thus they do not govern the treatment accorded by the states to their own citizens.[35]

Symmetrically, most contemporary constitutions enumerate property among the protected rights, albeit merely takings, and not restitution are constitutionally regulated. At a domestic level, however, things are even more complicated, and reparation efforts face serious dilemmas related to the retrospective/prospective or individual/collective dimensions of reparations.[36]

Kutz argues that "expropriation on its own is not a categorical wrong like murder or political repression; it does not by its very nature vault to the head of the line for repair."[37] Posner and Vermeule, argue that property is always uncertain in domestic law, due to the government's freedom to regulate that property at any time. However, add the authors, such unsettling of property

[31] Jasiūnienė v. Lithuania, Application no. 41510/98, Judgement of 6 March 2003, para. 38.

[32] Rucińska v. Poland, European Court of Human Right, Application no. 33752/96, Decision of 27 January 2000.

[33] Broniowski v. Poland, ECHR, Application no. 31443/96, Judgement of 22 June 2004, para. 182: Article 1 of Protocol no. 1 "does not guarantee a right to full compensation in all circumstances."

[34] Meron, Th.: *Human Rights and Humanitarian Norms as Customary Law*. Gloucestershire, 1991. 171.

[35] James and Others v. United Kingdom, Application no. 3/1984/75/119, Judgement of 22 January 1986, para. 58–65.

[36] Teitel: *op. cit.* 119.

[37] Kutz: *op. cit.* 285.

rights is tolerated, if it promotes a pressing social goal and its achievement does not significantly undermine the market.[38] Of course, this reasoning applies within the framework of a market economy. Still, a Hungarian Constitutional Court opinion cited in the foregoing paragraphs of this chapter, managed to declare some of the nationalization decrees as unconstitutional, exactly because their goal could not be defended on the basis of social need, while their finality was the liquidation of an entire property class.[39] (A quite contrary view was voiced by the Romanian Supreme Court, which held that the manner in which nationalization decrees have been applied could not be reviewed by the courts.[40]) The Hungarian Court's arguments back Sadurski's critique[41] of Posner and Vermeule: communist takings were not promoting a pressing social goal, and they did significantly undermine the market (by basically terminating it), thus they fundamentally differ from 'normal' takings, accordingly the tasks for the post-communist governments in handling past legacies were fundamentally different too.

As it was already hinted at in the foregoing passages, the legality of communist takings is controversial too. In many cases, the nationalization and confiscation failed to comply with the then existing legal requirements. But while legal takings are difficult to challenge, there is a much stronger case against illegal (or de facto) takings. One example of holding communist nationalization decrees unconstitutional is the above-cited example of the Hungarian Constitutional Court. Failure to comply with obligations assumed through international conventions is another example in this sense: the above described cases of the properties left over the Bug River, and the Hungarian-Czechoslovakian population exchange agreement illustrate the problem. Another good example in this sense is Decree no. 52 of 1950 issued by the State Council of the People's Republic of Romania, which led to the nationalization of a large number of houses and apartments. The decree disregarded constitutional guarantees, as it provided that the expropriated goods are transferred to the state without

[38] Posner, E. A.–Vermeule, A.: Reparations for Slavery and Other Historical Injustices, (103) *Columbia Law Review*, 2003. 68.

[39] HCC, AB 27/1991, 91/E/1990, *supra*.

[40] For further details: Brumarescu v. Romania, ECHR, Application no. 28342/95, Judgement of 28 October 1999, para. 15–20.

[41] Sadurski, W. S.: "Decommunisation". "Lustration", and Constitutional Continuity: Dilemmas of Transitional Justice in Central Europe. Florence, *EUI Working Paper Law*, 2003. 15.

any compensation.[42] The Lithuanian Constitutional Court has found that the "nationalization and other unlawful socialization of property" was started by the occupation government (i.e. Soviet Union). Therefore, even if the post-communist government cannot be held responsible for the actions of the occupying forces, steps had to be taken towards the restoration of rights of people which had been violated.[43]

Thus, under those circumstances in which the illegality of the takings can be demonstrated, there are strong reasons to recognize the 'survival' of former property rights, even if the state withholds the discretion to decide upon the concrete form of the compensation which may be granted in these cases. A category of exceptional cases is represented by the situations in which the state assumed an obligation (to compensate property losses) which was never fulfilled. In these situations, the right to compensation should be recognized as flowing from the state's lack of compliance–as the Hungarian Constitutional Court put it: constitutional omission[44]–rather than made function of an ex gratia allotment. The major problem with ex gratia reparation is that governmental benevolence does not equate with justice. Official magnanimity does neither presume (recognize) the existence of entitlement, nor of any governmental obligation towards their holders. Such compensation, alike presidential pardon, is rather about those who exercise the discretion, than those who benefit from it. This constitutes one of the main controversies of the Hungarian compensation law (no. XXV of 1991): the preamble speaks about the principles of the rule of law and the society's sense of justice, but at the end of the day, the entire scheme is made a function of state generosity.[45]

Critiques of the ex gratia approach to reparations have pointed it out that even acts of grace have to conform to constitutional requirements, and for instance should not affect the fulfillment of the state's constitutional, international or previously assumed legal obligations. According to this view, even the sequential approach to reparation (the periodicity of regulation, as opposed to the periodicity of execution) may appear problematic. Finally, it must be noted that magnanimity is classically regarded as a measure destined to

[42] The Constitution of 1948, art. 10 provided that expropriations can be effected only for a public utility, through law and upon the payment of just compensation established by the judiciary.

[43] LiCC, Ruling of 27 May 1994, and Ruling of 20 June 1995.

[44] HCC, AB 16/1993, 1378/E/1990; AB 37/1996, 837/E/1995; AB 45/2003, 960/B/19995.

[45] HCC, AB 21/1990, 1057/G/1990.

attenuate the consequences of the application of harsh laws, and not as a lawmaking principle.[46]

A peculiar case is the one of those who lost property as a consequence of their opposition to the regime, as an accessory punishment to criminal convictions. In many post-communist states, laws for the rehabilitation of those subjected to repression for political reasons were enacted. Rehabilitation also created the possibility to claim compensation for the property losses suffered.

Interestingly, the Venice Commission, in its Opinion on the Albanian Draft Law on Recognition, Restitution and Compensation of Property, considered that the "practicable solution" would be that instead of the recognition of original, pre-expropriation ownership, the compensation acts should create the title for regaining property.[47] In this regard, it worth noting the arguments of the Romanian Constitutional Court as to the contrary. The Court emphasized that in the case of properties, which were transferred into the state's possession through an unlawful act, or without any legal basis, the individual's legal right has never been extinguished. This means that symmetrically, the state has no ownership rights, and therefore these properties cannot be covered by the same acts, which regulate the legal status of property that passed into state ownership. To hold otherwise, would either confer a retroactive effect on such a norm, or create a form of taking unknown to the constitution.[48]

The second troublesome question that reparation schemes face is why do only certain wrongs committed under the preceding regime deserve compensation? In other words, what makes the difference between various past wrongs that justifies reparation? There are three possible justifications worthy of discussion: the recognition and protection of rights, the idea of past harm, and the principle of political persecution.[49]

In post-communist context it is rather difficult to ground property reparation on the idea of rights. The communist regimes that effected the takings made use of their legal powers to do so, except for the cases where takings took place under military occupation, in breach of the existing legal provisions governing expropriation, or the state simply failed to fulfill its obligations regarding compensations. Thus, as Teitel observes, "[p]roperty rights entitlements arising

[46] Sajó, A.: A részleges kárpótlási törvény által felvetett alkotmányossági kérdések [On the constitutional problems raised by the partial compensation bill]. (34) *Állam és Jogtudomány*, 1992. 200–201. and 220.

[47] European Commission for Democracy Through Law, Opinion no. 277/2004, CDL-AD (2004) 009, para. 9.

[48] RCC, Decision no. 73 of 19 July 1995.

[49] Teitel: *op. cit.* 132–134.

out of past wrongs are constructed ex post and are, simultaneously self-referential and justificatory of present property distributions."[50] But, the right to property is neither the sole, nor the paramount fundamental right recognized by post-communist constitutions.

The principle of past harm, as a normative value, does not offer enough guidance in justifying property reparations, at least in the post-communist context. And that because it simply sweeps too broad. As Elster remarked, "essentially everybody suffered under communism".[51] Some were imprisoned, placed under secret surveillance, had their books placed on index, barred from leaving the country or many simply lost career opportunities or suffered other losses. István Pogány noted that "the economic consequences of expelling Jews from certain sectors of employment [...] was at least as severe, for the individuals concerned and for their families, as the confiscation of property proved for others." The obvious result, to which the principle of past harm has to lead therefore, is universal and equivalent reparations.

Therefore, the third justification, namely political persecution (discrimination) needs to be brought into play. The above-mentioned Hungarian Constitutional Court decision did also relay on the discriminating feature of past takings, while attempting to demonstrate their lack of compliance with constitutionally protected values. The argument of the Court maintained that the notion of public utility does not extend to takings that stigmatize or discriminate against individuals or groups.[52] The nationalization process initially was targeting the assets of a certain class, later properties of a certain size, and finally the near complete annihilation of the institution of private property.

Discriminative taking, as a ground for reparation appears perhaps most obvious in the case of Holocaust restitution. In Hungary, after the fall of the right-wing regime, an impressive number of decrees issued between 1945 and 1947 provided for the return of immovable and movable goods–especially those pertaining to small businesses–and regulating the faith of heirless properties.[53] In post-war Czechoslovakia, Decree no. 5 annulled all transactions that occurred on the basis of racial or political persecution under the German Reich beginning with 29 September 1938. This was soon reconfirmed by Law no. 128 of 1946. Of course, Holocaust reparations take place in an entirely different context:

[50] *Ibid.* 133.

[51] Elster, J.: On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution. (1) *East European Constitutional Review,* 1992. 16.

[52] Pogány, I.: *Righting Wrongs in Eastern Europe.* Manchester, 1997. 171.

[53] Prime Minister's Orders no. 7590/1945, 3630/1945, 10.480/1945, 300/1946, 12.530/1946, 6400/1947, 5280/1947, and Governmental Decree no. 13.160/1947.

confiscation of Jewish assets was part of a genocidal program, which makes these claims more compelling.[54]

A paradoxical counter-example is represented by the Czech Constitutional Court's decision upon a challenge was targeting the decree on the Confiscation of Enemy Property and the Funds of National Renewal.[55] The act in question identified as enemies of the nation persons of German and Hungarian nationality, with the scope of subjecting them to property confiscation. The presumption of enmity was refutable if these persons could demonstrate their loyalty to the Czechoslovak Republic. As the Court pointed out, the decree was based on a presumption of responsibility of the German and Hungarian minorities. However, the Court did not found any discriminatory feature in the decree under scrutiny, arguing that the presumption of responsibility is a 'just sanction', a 'proportionate response' to the Nazi aggression, and not a nationalistic revenge.[56] The question of the "Beneš decrees" was raised at international level in front of the UN Human Rights Committee by a complaint against Slovakia.[57] Here the applicant alleged that the restitution scheme was discriminatory because it left uncompensated the victims of the 1945 seizures. The Committee, however, found that the scheme does not appear "prima facie" discriminatory, simply because it deals with victims of communism, but ignores the victims of injustices committed by earlier regimes. For these reasons, the complaint was declared inadmissible.

In any case, the criterion of persecution does not give a satisfactory explanation that may justify property reparations. True enough, it helps drafting the pool of beneficiaries by distinguishing those persecuted–the confiscation of dissident's assets is the paradigm–from all the others who may also have suffered some property losses. Still, not only property owners were persecuted under communist regimes, and from a moral perspective, for example persecution that took the form of imprisonment, can not be considered to be less worthy of compensation than confiscation.[58]

[54] Kutz: *op. cit.* 285.

[55] Decree No. 108/1945 Sb.

[56] CCC, Pl. US 14/94. 15–19.

[57] Peter Drobek, v. Slovakia, Communication No. 643/1995 (31 May 1994), CCPR/C/60/D/643/1995.

[58] As Offe and Bönker, argue, "it would be morally wrong to let the choice of rectificatory strategies be distorted by the morally irrelevant fact that property can be given back, while years lost in prison cannot." Offe and Bönker in: A Forum on Restitution: Essays on the Efficiency and Justice of Returning Property to Its Former Owners, *East European Constitutional Review,* 1993. 31.

Further, bearing in mind the Hayekian objection towards distributive justice, this paper argues that even those who had been placed in an equal situation–i.e. all suffered past property injustices–are not offered an objectively equal opportunity to claim redress. Due to the fact that the schemes addressed reparations–at least in part–from a distributive perspective (which resulted in an attempt to create a substantive equality between victims), the result that they achieved was objective inequality, as everyone was entitled to reparations between the same limitations, while everyone suffered losses of different extent.

There are four main aspects under which the limitations placed upon reparations betray egalitarian attempts, while in practice they result exclusion: person-related limitations (citizenship and residence), quantitative (caps), temporal (cut-off dates), and finally property-based (distinctive treatment according to the nature of the lost property: movable or immovable, various immovable, commercial, religious and communal). These differences in treatment between various former owners are mostly arbitrary, and in certain cases deliberately introduced so as to produce inequalities, and thereby meet the Hayekian concerns as far as they produce results that conflict with the idea of the rule of law. The analyzed provisions of the reparation schemes lead in practice to the creation of winners and losers of reparations, to a breach of the idea of formal equality before the law.

The most common person-related limitation on reparation is the one that requires for the victims to possess the citizenship and/or to be resident of the state against which they are willing to vindicate their claim to reparation. These requirements were set in order to exclude certain 'undesirable' individuals, who left the country during or even prior to the communist takeover. This is the case of the former, pre-communist elite and of the dissidents, and in many cases also of certain ethnic groups, like Sudeten Germans and Hungarians (expelled from post-war Czechoslovakia), Russians in the Baltic States, and Jews in several cases.[59]

> Under what I call 'strict regimes', both of the above conditions were–at least originally–contemplated by the restitution or compensation schemes, in certain cases a subsequent easement was brought by the courts. Lithuania, Czechoslovakia and subsequently Slovakia managed to stick to the harsh rule, while in the cases of the Czech Republic and Poland the residence condition was considered as unconstitutional and eliminated by the constitutional courts. 'Milder regimes' established only one–or, both, but alternatively–of

[59] Avineri, Sh. in: A Forum on Restitution: Essays on the Efficiency and Justice of Returning Property to Its Former Owners. (2) *East European Constitutional Review,* 1993.

the two criteria. Accordingly, further distinctions may be made depending whether a policy fashioned exclusively the citizenship condition–which is obviously harsher, as it excludes those who lost their citizenship in the meantime–or it accepted also residence as an alternative–obviously milder, as it accommodates also returning expatriates. In this section fall the two other Baltic States, Hungary and Romania. The German solution constitutes an exception, as Property Act[60] did not envisage any residence or citizenship related restriction on the potential circle of beneficiaries. The initial approach excluded, however from restitution properties taken during the Soviet occupation.

Turning to the issue of quantitative limitations, it can be said that reparation programs differed significantly under this aspect. In the case of Hungary and Poland, original properties were not returned–except for certain religious assets,–merely a partial compensation in form of vouchers, or the possibility to offset the value of the taken property against new acquisitions was offered instead. In the other analyzed countries actual restitution–of the originally taken or in kind–was contemplated, but to different extent: almost all programs included an upper limit on the reparations that could have been received by individual claimants. The question of ceilings is problematic, because instead of giving each individual an equal objective opportunity, it gives an equal subjective possibility to receive compensation within general and equal limits. This treatment goes categorically against the rule of law, according to the above-cited passages from Hayek, as they deliberately produce inequality. What is problematic here is the fact, that these schemes under the guise of equality result in fact in exactly its opposite, as they create an opportunity to full compensation for small holders, while former owners of larger estates necessary receive only a partial redress.

The third type of limitations that were imposed by all reparation programs were related to the cut-off date, i.e. the point in past, which marks the beginning of the period of time that the scheme was meant to cover. As these programs were–at least partially–intended to rectify past injustices, they naturally had to have some definition of this 'past'. However, even if seemingly objective in its character, the cut-off dates could have been manipulated in such a way so as to discriminate between the victims, and to favor certain groups over another. In post-communist context the various reparation schemes came up with different solutions as to the setting of a cut-off date. Ranging from the Polish case, in which, due to its exceptional character of compensating only a

[60] Gesetz über Regelung offener Vermögensfragen of 23 September 1990.

rather small category of victims, the cut-off date problem does not exist, as such, to the German approach, which logically and unequivocally rolled back the baseline so as to cover both Nazi and communist era takings, the policies fancy diverging cut-off dates. The Baltic States and Germany represent a fairly unproblematic category from this perspective, as their reparation programs were drafted in such a way so as to include from the outset both Nazi and communist era takings.

Setting a timeframe for reparation law's applicability was an objective necessity: the legislators had to decide how far they intend to reach back into the past for rectifying former property injustices. Obviously, the history of property injustices can not be restricted to Nazi and communist takings. Rectification programs may attempt to deal with wrongs older than a century: the post-colonial examples of Native Indian, Aborigine and Maori claims constitute the relevant paradigm. Of course, to design such a scheme it does not take merely a willing government, but also a significant popular demand in this respect. The relative success of the above-mentioned examples is largely do to the existence of well-organized and goal-oriented organization of former owners, with a significant enough political weight to exert a sufficient pressure on the government.[61] For example, Verdery notes about post-communist Russia, that restitution is impossible because collectivization took place much earlier than in the rest of the communist countries, while the preexisting private ownership structures were extremely unstable.[62] Accordingly, the absence of a comprehensive reparation scheme is partly do to the lack of surviving victims. This lack of such survivors can be covered by organizations, as in the case of the indigenous claims, or, more closer to Europe, the various Jewish organizations (arguably the most successful of them being the Claims Conference), that sustained with relative success claims for heirless properties. Being an essential element of any reparation program, the cut-off date is, in the same time, a handy tool of exclusion: through the setting of such baselines certain groups of victims can be distinguished and excluded from the benefits of the scheme.

As to what concerns property-based distinctions, it must be said that in most cases the various types of properties were treated separately, sometimes also by separate norms. The most common distinction made by the legislators

[61] For instance, while writing about Maori restitution, Barkan notes that the Maoris count for about 13% of the population; Barkan, E.: *The guilt of nations: restitution and negotiating historical injustices.* New York, N. Y. 2000. 167.

[62] Verdery: *op. cit.* 91–92, quoting Humphrey, C.: *Marx Went Away but Karl Stayed Behind.* Ann Arbor, MI, 1998.

was the one between agricultural properties (and forestry) and buildings, thus between different kinds of real property. This separation usually meant also a difference in treatment, and this in certain situations resulted in unequal outcomes for the former owners. Another type of–perhaps less artificial–distinction was the one between movable and immovable properties, and this was quite important too, as post-communist reparation schemes mostly avoided to address the issue of movables, a question which, in turn, was more present in Holocaust restitution claims. Finally, a third type of problematic property-based distinction was made on the basis of ownership: some of the programs discern between communal (and various forms of communal) and individual types of holdings, while in every case distinction is also made between commercial and non-commercial properties. Distinctions made according to the certain property objects produce exclusion–the loss of certain objects is simply not compensated, while other objects lost in similar circumstances are–or, attempt to equalize the outcome of the process, by including different categories of property under a broader ceiling.

Finally, in the conditions in which reparation schemes fall short from a thick conception of the rule of law (justice, rights or objective equality) it worth investigating, whether requirements of a thin reading–focusing on foreseability, clarity and consistency–are still met by post-communist property redistribution.

The European Court of Human Rights, in the Paduraru judgment has explained in some details the legal uncertainty that may be engendered by the norms' lack of clarity and coherence. It has also noted that the great number of complaints filed with the Romanian courts for the return of properties or for the annulment of purchase contracts is exactly the product of this uncertainty, while the judges required to decide these cases lack a sufficiently predictable and coherent legal ground. The Court has also noted that diverging outcomes are inherent in adjudication, but the role of the supreme judicial body would be exactly to solve such contradictions in the case law (and pointed towards to Romanian highest instance's indecision on controversial questions of law). Absent a mechanism that ensures coherence in adjudication, persistent and profound divergences in questions of great social interest can lead to the engendering of a permanent uncertainty and a loss of confidence in the judiciary, a fundamental component of "l'Etat de droit".[63]

Accordingly, even at its most minimalist interpretation, the rule of law must mean the rule of regular and foreseeable law, which, in a perhaps over-

[63] Paduraru c. Roumanie, CEDH, Requête no 63252/00, Arrêt de 1 decembre 2005, para. 94–99.

optimistic reading may eventually amount to procedural fairness. Unfortunately at least under three aspects–valuation, time limits and probation–the reparation schemes' provisions are not beyond criticism.

The practice of leaving the establishment of the concrete form and extent of the compensation to be received up to further governmental regulations was found unconstitutional in Lithuania[64] (for breaching rule of law requirements such as clarity, certainty, security and protection of legitimate expectations), but was left unchallenged in Romania. In Hungary, the Constitutional Court found acceptable the government's reluctance to fulfill international obligations relating to compensation, holding that the common solution given by the Compensation law shall be applicable also to those whose original entitlement arose from international agreements.[65]

Deadlines for filing claims to reparation proved unrealistically short, and even in those cases in which they were not challenged in court, they were subsequently prolonged–even repeatedly–to make it possible for more applicants to benefit from the project. In Czechia for instance, the Constitutional Court found the shortness of the deadline as an effective barrier for the applicants in pursuing their rights,[66] while in Slovakia similar claims were dismissed on the grounds of that special circumstances justify special treatment.[67] The length of the reparation proceedings was also problematic. The Lithuanian Supreme Court found a breach of the right to effective remedy,[68] the Estonian Supreme Court spoke about the violation of the requirement of legal clarity,[69] while the Hungarian Constitutional Court discovered an unconstitutional omission in cases in which the authorities failed to react in reasonable time.[70]

Evidence-related problems have arisen either in combination with the shortness of deadlines (in Hungary, for e.g. it was possible to complete the submitted application even after the deadline has passed, but in Slovakia failure to comply with legal requirements was considered to result in the lapse of the claim), or due to the authorities refusal to allow access certain sites or documents. Further, certain forms of evidence, such as witness testimonies were not allowed in the majority of the analyzed cases. In Poland, for example, a witness-related requirement that in practice precluded anybody younger than 78 years of age

[64] LiCC, case no. 19/02, Ruling of 23 August 2005.
[65] For e.g. see: HCC, AB 16/1993, 1378/E/1990.
[66] CCC, Pl. US 3/94, Judgement of 1 November, 1994.
[67] SCC, Pl. US 3/00 of 24 April, 2001.
[68] LiSC, Ruling of 22 May 2000.
[69] ESC, Case no. 3-4-1-5-02, Decision of 28 October 2002.
[70] HCC, AB 16/1993, 1378/E/1990.

from deposing in the favor of the applicants, was found to be at odds with the principle of the rule of law.[71] However, a Romanian provision that required depositions to be made by all the owners (or their heirs) of the plots surrounding the claimed land remained unchallenged. Conclusively, in many situations it was up to the constitutional courts to come to the former owners' rescue and clarify problematic provisions. While in some cases the constitutional courts came to the individuals' rescue by striking down some of the problematic legal provisions, or court decisions, in other cases they remained deferential, and upheld the legislative arrangements, and in the third instance, some of the problematic provisions passed unchallenged. Still, a massive involvement of constitutional courts in the reparation process is problematic in itself. As Sadurski notes, strong judicial review system may send a negative message, obscuring the rights discourse and lifting it from public discourse (deliberation) to the small, specialized world of constitutional experts. And this aspect is considered to be at least as important, as the undeniable gains–visible in reparations perspective from the above analysis–of having the legislation monitored by specialized guardians.[72]

The post-communist governments of Central and Eastern Europe had two main options in entrenching a new political elite resulting from a combination of the old nomenclature and the leaders of the democratic opposition movements, which was experiencing a pressing need for legitimacy after the fall of the totalitarian rule. One was the political option, consisting in demonstrating allegiance towards democratic values and institutions–to the rule of law. Other was the economic option, the creation of a market economy that carried the promise of a well-being characteristic of the much envied capitalist societies.

Unfortunately, the solution chosen was arguably the worst one, as transition governments attempted to achieve both options in the same time, under the false impression that the two totally distinct goals may legitimate and support each other. As this paper argues, it is theoretically untenable to pursue an even (or close to even) distribution of property in the name of reparatory justice on the basis of the argument that this would facilitate better the emergence of a market economy. It is equally wrong to talk about the role of privately owned property in a market economy, as an argument that justifies mitigation of past property injustices.

[71] PCT, K 2/04, Judgement of 15 December 2004.

[72] Sadurski, W.: *Rights Before Courts. A study of Constitutional Courts in Post-communist States of Central and Eastern Europe.* New York, N. Y. 2005. 298–299.

The complexity of tasks that transition societies had to face is obvious and uncontested. Czarnota, Krygier and Sadurski wrote in this context about the burden that has fallen upon "institutions of justice", in the attempt to conceal the competing interests and expectations, a process, which resulted in a transformation of "expectations and the realities on which they are based."[73] This view echoes to a certain degree Teitel's argument on the role of law during transitions. Accordingly, during transition periods, rule of law ideals are applicable only with significant amendments, generated by the tumultuous context of the transformation process. Transitional law, according to Teitel, is a sui generis paradigm, a vehicle of social, political and ideological transformation.[74]

The analysis of the various property reparation processes across Central and Easter Europe, however, create and uneasy feeling towards the above-delineated conception of the transitional rule of law. For as it was argued, property reparations pursued a number of goals and not all of them were targeting the greatest benefit of the people. A redrafting of power structures was taking place, a struggle between the elites, which defined to some extent the context of transition, and thus, implicitly, the rule of law ideals, as Teitel correctly noted. Obviously, law had to be responsive to these circumstances of the political change.[75] Albeit the question that arises is whether one may accept all the outcomes–the distinctions made by reparation schemes, the exclusion of certain groups (of former owners and of types of properties) from the benefits of the program–under the argument that "it is what the law does and it is the reason why law does it"?[76] Is perpetuation of old (and creation of new) injustices justifiable by the sui generis nature of transition?

The answer to these questions, in the light of problems analyzed in this paper must be a categorical no. Regardless, how specific the circumstances of transition from authoritarianism to democracy are, regardless of the transitional tasks of the rule of law, a core, a minimum of the ideal must be recognized as invariably surviving in any kind of regime context (transitional or not), for otherwise there would not be much left to talk about. This–on the footsteps of Krygier–I take it to be the protection against arbitrary exercise of power.[77] Arbitrary, in property reparations context equates with unjustified

[73] Czarnota–Krygier–Sadurski (eds.): *op. cit.* 3.

[74] Teitel, R.: Transitional Rule of Law. In: Czarnota–Krygier–Sadurski (eds.): *op. cit.* 279–294.

[75] *Ibid.*

[76] Krygier, M.: Rethinking the Rule of Law after Communism. In: Czarnota–Krygier–Sadurski (eds.): *op. cit.* 271.

[77] *Ibid.* 272.

distinctions in the treatment of those placed in an equal situation. Whereas unjustified stands for the lack of any convincing argument that may explain how the envisaged scheme does contribute to a better furtherance of the multiple goals that it proposed to achieve. As it was argued, economic reform and mitigation of past injustices are goals, which can not explain and justify each other.

The amendments to the rule of law ideal, justifiable in the context of transition can go as far as–for example–to allow governments to decide upon the concrete form of the reparation, the type of wrongs it want to address, the period in time intended to be covered. As it was shown in this paper, there are clear-cut guidelines neither in international law nor in legal theory that may shed enough light on these matters. But they may not create winners and losers; they may not distinguish between those placed in the same situation. For transition may come to an end, but the injustices that it entrenched will perpetuate.

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BOOK REVIEWS

Korinek László: **Bűnözési elméletek** [Theories of Crime]. BM Kiadó, Budapest, 2006. 430 pp.

This book–a much awaited addition to the Hungarian criminology literature–was written by László Korinek, Chair of the Criminology Department at the University of Pécs, editor-in-chief of the Law Enforcement Review (the Law Review of the Hungarian Ministry of Justice and Law Enforcement), and former Under-Secretary for Law Enforcement in the Ministry of Internal Affairs is. Since 1971, there has not been any comprehensive criminology books published in Hungarian, thus for decades, scholars have had to do without a systematic examination, comprehensive historical overview and critical analysis of criminology models–theories about the causes underlying crime. The present volume fills this void, providing within its five chapters a classification of the spectrum of theories, also portraying the history and development of the field.

In the preface to the comprehensive review of Hungarian as well as international theories of criminology, Professor Korinek makes no secret of the fact that–despite significant advances and valuable insights gleaned over the decades–this area of inquiry is yet to elaborate a theoretic framework that would be suited for a prime practical application: effectively curbing crime. Still, the author's hope is that the theories and considerations he describes would stimulate contemporary and future research on the theory of criminology as well as associated practical applications.

From the ancient beginnings until today, the book surveys the spectrum of theoretical explanations for understanding criminal behavior, along with the relevant Hungarian as well as international literature. In the second half of the book, the author provides a critical analysis of issues having to do with victimology, penology, the criminal justice system, police models, organized crime, terrorism and risk society.

Chapter 1 distinguishes two approaches to examining the causes of crime: one seeks to uncover various causes (physical and mental alike) within the individual; the other is based on social determination. Three major contemporary paradigms are subsequently discussed: the etiological, cause-oriented paradigm, which focuses on examining the causes and circumstances of crime; the

emergence of a system of norms for criminal law; the interactionist model, which studies the authorities, their stigmatization; the radical or critical paradigm (which includes feminist, Marxist, postmodern, left-wing radical as well as peace-making criminology). Having introduced the spectrum of theories, the author goes on to outline how criminology qua field of inquiry emerged.

Chapter 2 begins with the classical school associated first and foremost with Cesare Beccaria, centering on the actions of agents with free will. Subsequent discussion covers the Italian and French positivist tradition, both of which emphasize the biological and social determination of agents. The chapter closes with the mediating school made famous by Franz Liszt, which aims at reconciling the classical and positivist schools.

Professor Korinek remarks that whether we look at phrenology involving the study of skulls and brains, whether we examine physiognomy, which emphasizes aspects of physical appearance indicative of character traits and personality, or whether we instead turn to theories that explain criminal behavior in terms of the operational malfunctions of society, there is one thing of which we can be certain: criminology has evolved into a genuine scientific field based mostly on empirical research.

Chapter 3 is the most extensive chapter of the book, divided into ten sections to cover the theories of criminology emerging through the 20th century. The author begins with the anthropological school (which modernizes theories of phrenology, focusing on biological, physical-mental attributes), the rediscovery of physiognomy (which emphasizes character traits that can be identified based on physical appearance), eugenetics (research about the possibility of societal interference into human hereditary traits), endocrinological and biochemical anomalies as causes of criminal behavior, childhood brain damage, chromosomal abnormalities, and other theories that suggest neuro-physiological and neuropsychological connections. Here, the reader is also provided with an overview of the methodology behind twin studies and adoption studies, as well as interconnections among intelligence, psychopathic behavior and crime. Section 2 delineates theories about antisocial, asocial and psychopathic personality, with special attention to the basic tenets of the psychoanalytic tradition, Containment Theory, Attachment Theory, Social Control Theory, Learning Theory, pointing out their major limitations, along with their implementation in cognitive behavior therapy. Section 3 moves on to Cultural Conflict Theory and Subcultural Theory (particularly the subculture of violence), which thrive to explain criminal behavior based on the incomplete or deviant socialization of the individual. Section 4 outlines neoclassical theories. In this section, the reader also finds descriptions of the theories known as Rational Choice Theory (according to which crime is based on a cost-benefit

analysis), Routine Activities Theory, Low Self-Control Theory, and General Criminal Theory.

Personality-based theories examine crime based on mental factors; others, like the theories about social structure introduced in Section 5, regard individuals as embedded in society. Sociological theories attempt to make sense of the emergence of crime based on societal-environmental factors. Closely related to these theories are the structural approaches–Anomie and Social Disorganization Theory–examining crime from the perspective of structural functionalism. Section 6 covers institution theories, with special emphasis on Labeling Theory and Moral Panic Theory (both of which thrive to explain deviance based on the definitional practice of social control institutions), phenomenological and ethno-methodological approaches, as well as Interactionist Theory, which interprets crime as a malfunction within the web of interconnections between society and the criminal.

The next pair of sections describe the Multi-Factor Approach and Social Protection Theory, both of which attempt to harmonize diverging viewpoints, trying also to explore new resocialization possibilities. The final pair of sections discuss radical (critical) and cultural theories of criminology (including left-wing realism, anarchist, feminist, neo-Marxist, postmodern, constitutive, peace-making and green criminology), which raise questions about the basic tenets of traditional criminology.

Chapter 4 provides an introduction to six major issues and research topics that have been commanding criminologists' attention. The first section discusses victimology, hidden crime, and fear of crime (including subjective sense of safety, aggressive behavior, and vigilantism). Section 2 addresses fundamental issues of penology, penal science, with subsections devoted to capital punishment, life imprisonment without parole, mediation and shaming. Section 3 approaches the justice system as a system that possibly plays a role in the causal processes underlying criminal activity. Besides issues related to courts, the prosecutor's office, criminal policy, and criminal legislation are considered, along with various police models (based on criteria that are professional, society-oriented, or related to data processing), and the principle of zero tolerance. Although the book is explicit about not attempting to provide a detailed overview of criminology research related to specific criminal offenses, or even various types of criminal offenses, in the next pair of sections, it does cover the major issues and legal material pertaining to white-collar economic, organizational and organized crime, the criminal responsibility of the legal individual, as well as terrorism, and violence by the state. The final section is devoted to theories of security, risk society, the criminology of complex security, and new trends in crime prevention.

What is the future of criminology? *Chapter five* concludes by raising this very question, paying special attention to the current renaissance of criminal biology and euphenics.

The author concludes that in the future, beyond scientific and academic influences on the field, criminology will continue to adjust its themes and choice of topics to the prevalent patterns of crime, with special attention to accounting for global as well as local problems, the preparation, follow-up and assessment of local and regional projects.

Professor Korinek describes this in the final chapter of his book: „Theories of criminology cannot be compared to a building erected by generations of researchers substantively and proportionately building upon the scientific achievements of their forebears. Criminology is more like a rather eclectic piece of art. The eclecticism is due in part to the large array of contributing hands, but its primary source is the varied nature of the contributors' ways of thinking. In a rapidly changing world, with each era, scientific researchers tend to have a different view of what values are considered important: the aspect of criminal human behavior, perceived connections considered relevant keep changing... The practical significance of the sciences hardly needs stressing in the present era of the knowledge-based society. Applied research–in the strictest sense of the term become an obvious, inevitable necessity. And applied research is possible only if there is a theoretical basis to underpin it. Due to the very nature of the topic at hand, the delicate social issues it raises, and the dangers associated with crime as well as certain mistaken conceptions and applications of law enforcement, criminology will continue to be an indispensable subject of inquiry in the foreseeable future. The present work is aimed to make a contribution towards this goal."

With its in-depth and all-encompassing coverage, Professor Korinek's book is sure to become an indispensable item in the libraries of scholars and students interested in criminology.

András L. Pap

Boóc Á.–Dömötör L.–Sándor I.–Szappanos G.: **A hiteles fordítás és a hites tolmácsolás alapvető kérdései** [Fundamental questions of authentic translation and authentic interpretation]. HVG–ORAC, Budapest, 2006. 357 p.

In December 2006 *Fundamental questions of authentic translation and authentic interpretation* was published by HVG–ORAC. The authors Ádám Boóc, László Dömötör, István Sándor and Géza Szappanos aspired to summarize the most important legal problems concerning the questions of authentic translation and interpretation and to provide a draft of the national regulations in the context of an international overview. Composed of several chapters, the book, which can be considered the first Hungarian manual on this subject, reveals the regulation in this field of law in its complexity with accuracy, precision but still in a readable and easy-to-understand format.

Authentic translation and authentic interpretation can be considered as autonomous professions. The legal terms make the translators' work hard, so besides the language one has to be thoroughly familiar with public administration and the culture of the given country in order to provide an appropriate translation.

"Translation is distortion"–the authors remind us of the Italian saying in the introduction of the book, referring to the tremendous role and responsibility of the authentic and correct translation of our thoughts and business intentions to a foreign language has become. Hungary is not an exception as more and more Hungarian business associations build business relations with partners from a member state of the European Union. Several foreign investors established businesses in Hungary; the foundation of foreign firms has increased.

The purpose of the work is to show the different regulation systems in foreign countries to the Hungarian readers and to make the Hungarian regulations available to non-Hungarian speakers. The preparation and the utilization of an authentic translation and interpretation is a complex field raising linguistic questions, therefore the second chapter contains a theoretical essence and an analysis of some of the main points of special legal translation.

Legal translation has undergone a change over the past decades and can be divided into categories in several ways. Peter Sandrini divides the translation of legal texts into four parts: 1) translation of a legal text between two legal systems; 2) translation of a legal text from different legal areas; 3) translation of a legal text within one legal area; and 4) translation of a legal text within one legal system. Consideration of the theory of translation of legal texts is relatively new in linguistics.

The difficulties of the translation of legal texts are very well demonstrated by the legislation of multi-lingual countries. An especially good example is a

country where besides the dominating common law the influence of the continental law can be seen as well. The structure of laws in Canada and Switzerland are very different from that of the classical Roman law, which further complicates the job of the legal translator.

When translating a legal text, besides the structural items, it is also very important how each sentence of the law is translated. The tradition that a charter shall be one sentence long goes back to ancient times. Eugen Huber, the originator of the Swiss Civil Code thinks that any clause of the law may consist of a maximum of three paragraphs with one sentence in each paragraph, and one sentence shall express only one regulatory idea.

The translator of legal texts has to face further difficulties. A critical point is the complexity of the legal language. For example the English legal language originates from the vocabulary of the French and Latin languages, while at the same time the Scandinavian impact from the mid-10th century is also relevant. The work also points out that the English word *law* has a Scandinavian origin.

There is a significant discrepancy among verdicts in different languages. French verdicts are characterized with a strict force of form thus translating them to a language with a different culture is a difficult task. Besides the structural discrepancies the translator of legal texts also has to pay attention to style. In the Canadian Penal Code the provisions are written in the imperative mode in English and in the declarative mode and passive voice in French. Lots of problem arise because the German legal systems do not show a consistency either. *Besitz*, or possession, does not mean the same in the Swiss, German and Austrian law, as in the first two it only means the possession while in the Austrian law it means the possession with the aim to appropriate.

The ituation of the translator is even more complicated in cases where the legal language are used within a state differs from the official language of that state. The most typical example is The Netherlands, where the legal language of the European areas, the Dutch Antilles and Aruba very much differ.

In the field of international legal translation difficulties of interpretation frequently arise. This is also related to the transition of international concepts to national law. It is worth noting here that there is a difference caused by the discrepancies of the legal systems whether the translator translates the laws themselves or the legal text. The legal translator shall not only translate the text from the source language to the target language but also to the special legal terms of the target language. It is less of a problem when the two legal systems are similar as knowledge of the special legal language makes it easier to match the special terms. The translator's work is harder when a legal term means different things in different languages. For example in Spain the word

judge has two meanings: one is *jueces,* they are the judges proceeding alone, and *magistrados* who work in council.

What is the solution if a given term cannot be translated to a foreign language? According to the Dutch Gerrard-René De Root, the translator has three options: 1) the term is not translated, just left in the text and explained later; 2) a paraphrase is used in the source language; 3) a new term is introduced in the source language with neologism. According to Susan Sarcevic the appropriate method is "making it natural", meaning the term of the source language is adapted according to the rules of the target language.

It is important to mention that while translating legal texts it is possible and practical to rely on the foundations of Roman law this is not an exclusive solution. Today the terminology of Roman Law means a kind of international lawyers' "legalese".

With regard to special legal translation one may think that the creation of a special legal dictionary would be an appropriate answer to the problems illustrated above. Of course there are lots of special dictionaries and Gerard-René De Root set up certain requirements to such works. In De Root's opinion, it is worthwhile to call the reader's attention to the problems translators usually face when translating legal texts. In cases where the translation of a given term is impossible it has to be highlighted and specially marked.

Besides the translation of special legal texts, authentic, or official, interpreters (generally involved in court procedures) also play an important role. In the procedure the interpreter immediately translates not only what was heard but does a sight translation of the documents introduced as well. Court interpreters and official interpreters in general have to comply with numerous rules of conduct and ethics. It is worth mentioning that the Australian Institute of Translators and Interpreters prepared a code of conduct for its members. When defining the role of the interpreter the code states that the interpreter shall never proceed as a representative or a client.

While selecting the interpreter taking part in a court procedure not only the legal provisions have to be taken into account but also a list of other factors. Kurt Jessnitzer reminds us that in penal procedures when the victim of a sexual crime has to be heard the sex of the interpreter might be important.

In the next chapter the authors discuss the legal provisions of foreign legal systems concerning authentic translation and authentic interpretation, and explore the role of authentic translation and foreign deeds in civil law.

In German legal systems authentic translation and authentic interpretation have a high importance in civil, penal and administrative procedures. They play a significant role not only in procedures concerning foreigners but also in the translation of Community law. The discrepancy between the national and

Community law makes the life of the legal translator even harder. The 1961 The Hague Convention on Abolishing the Requirement of Legalisation for Foreign Public Documents established a unity in a certain way concerning the authentication of foreign documents.

The *Zivilprozessordnung* regulating the Austrian litigation procedure states that a public document issued in a foreign country has a full conclusive force in Austria only in the form of authentic translation. The German *Zivilprozessordung* provides that a translation to be used in a civil suit can only be translated by a translator specialized in legal translation who is duly registered by the court system of the given federal state.

The German law contains special rules to notaries concerning the use of foreign languages. The deeds are made in German language. In cases where the client so requires and the notary is familiar with the given language, it is possible to prepare the deed in both languages. The same applies to authentication.

It is also an important question which client can be seen as familiar with the given language. An important aspect is the client's ability to express his or her thoughts clearly and definitely thus being able to proceed. It is not seen as lack of knowledge of language when the client speaks with an accent or makes grammar mistakes when making a procedural statement. It has to be emphasized that while in several legal systems the rules pertaining to experts are also applied to interpreters, the German practice points out that the interpreter and the expert cannot be equated. The role of the interpreter is basically to establish a linguistic connection between the persons taking part in the procedure.

The authors analyze the solutions of the Anglo-Saxon countries as another large group of foreign legal systems. Having numerous foreign connections and integrating persons of different national origin, in Canada authentic translations are undertaken by the *Translation Bureau* as state service provided to public administration agencies. In case a verdict is written in a language other than English or French its authentic translation has to be prepared in Québec. Bilingualism is also the case in Ireland, where a number of interpreters have to work in the court from time to time. In the area of Gaeltacht writs and notices have to be supplied with an authentic translation.

Authentic translation is also used in the legal practice of England. A good example is the Act on Business Association of 1985, which provides for registered foreign associations to prepare authentic translation in certain cases in order to participate in the English legal practice, and the translator has to make a declaration regarding the true and faithful nature of the translation. In England the decision whether an interpreter is needed or not is the

discretionary right of the judge. The English interpreter has to be sworn in prior to commencing interpretation. Moreover, English law makes a distinction between translator, interpreter, linguistic expert or other expert.

The United States of America followed the so-called specialist way regarding special translation or interpretation, meaning that interpreters in special areas are trained in the particular professions. Because of the composition of the American society the need for Spanish official interpreters is the highest.

In court procedures the president of the committee of proceeding judges makes the decision as to the assignment of an interpreter. In penal cases the cost of interpretation is covered by the State, in other cases the judge will rule on which party shall bear the costs.

The importance of the task of authentic interpreters in the United States is also shown by the fact that the administrative office of courts has prepared a model clause of the text of the verbal and written oath. This oath places court interpreters under a strict obligation. It demands them to uphold the dignity of the court and to interpreting impartially and without private communication. The *American Translators Association* with more than 6000 members represents the rights of translators and interpreters.

Minorities made the role of linguistic transfer important in Australia as well. In Australian public administration there are bodies of the authentic translation at a state and at the commonwealth level as well. At the commonwealth level, the *Translation and Interpreting Service* was established in 1973, and at state level, mention should be made of the *Legal Interpreting Service* in Victoria state, which provides translation services to government agencies and to the police. This organization has its own code of conduct as well as regulations pertaining to aspects such as impartiality, accuracy and competency.

As opposed to the United States, in Australia the general principle dominates, thus anybody wanting to be an interpreter has to take the accreditation examination organised by the *National Accreditation Authority for Translators and Interpreters*, or has to participate in training organised by this body. In New Zealand the use of official translations of deeds in court procedures should be highlighted. As is known, the official language of New Zealand is Maori. However, when submitting a document an official English translation is also necessary.

Similarly to New Zealand foreign deeds and their utilization in court procedures play an important role in Hong Kong. As of the 1st of July 1997 Hong Kong has been returned to China. From the legislative point of view this brought the need to translate the law into Chinese and for laws to be bilingual. However, Hong Kong enacted a law in 1986 permitting to create laws in either English or Chinese.

As an exotic example, Malaysia is worth mentioning, where the Malaysian National Institute of Translation was established in 1993. The institute provides services in the following languages: Malaysian, English, Mandarin Chinese, Tamil, French, Arabic, Japanese, Korean and Latin.

In the closing part of the chapter the authors analyse relevant questions of international civil law and the European Community law. In these fields of law the use of foreign deeds and their translations is especially frequent. Numerous examples are provided of international cooperation in the field of foreign certification, delivery of documents and acceptance of foreign deeds. It is worth highlighting the 1965 The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which provided the possibility of direct service of documents between the judicial bodies of the member states.

Directive 1348/2000 of the European Council expedited and upgraded the system of forwarding court and other documents. Its most important provision relevant to the subject matter of the book is that for reasons of security the document to be forwarded has to be accompanied by a predefined form that must be filled out in the language of the place of service or in any other language accepted by the member state concerned.

The 1970 Convention on Taking of Evidence Abroad in Civil or Commercial Matters states as the main rule that the letter requiring the evidence must be translated into the language of the country to which where the letter is sent.

Concerning the world outside Europe, Inter-American Convention on legal assistance among the Central and South American countries, amended in 1979 provides for the letter rogatory to be translated into the official language of the country where it is sent, but it is not compulsory to translate the annexes to the letter.

Regarding Community law, difference in the languages of the parties rises as a fundamental problem in the practice of the principle of equal treatment. This is because there is a ground rule in all member states that the official language of the given member state shall be used in the national courts.

The importance of the European Convention on Mutual Legal Assistance lies in the fact that it aims to set forth unified principles in the field of translation and authentication. However, beyond legal aid the role of translations can be important in admission and enforcement. Known by its French acronym SCIC, the Joint Service Translation and Conferences employs 500 interpreters and 155 administrative staff. With its 1.2 million entries the multilingual terminology database called Eurodicautom is a major help for translators.

At the end of the chapter the authors describe the regulations on documentary evidence in each European country. Council Directive 1206/2001 aiming at

expediting and simplifying the cooperation among courts regarding evidence in order to promote the functioning of the internal market. Under the Directive the request has to be sent in a unified form written in the official language of the addressee country. The language of requests and reference is the official language of the country addressed. Wherever other documents are attached to the request, they also have to be translated to the same language.

The title of the first chapter of the book is The question of authentic translation in the Hungarian legal system and practice. It is to be noted that while Western European languages belong to the Indo-European language group, Hungarian is a Finno-Ugric language, therefore it is highly important that an authentic translation of the Hungarian official and other documents be provided. EU accession underscored the importance of foreigners participation. The role of authentic translation is increasingly recognized.

As a starting point the Hungarian Constitution should be examined, which prohibits discrimination on the grounds of language. In a significant part of court procedures the statements and attitudes of the parties are very important. It is to be ensured that neither party has to face a disadvantage because the lack of knowledge of a language.

The authors of the book give a detailed description of the rules regarding the use of language in the following procedures: 1) public administration procedure; 2) civil action; 3) penal procedure; 4) arbitration procedure; 5) procedure concerning business associations.

As regards public administration procedure Act CXL of 2004 provides that a client has the right to use their native language in their procedures with the authorities, and it sets forth detailed regulations on the use of language. The official language of procedure is Hungarian, however, it is possible to use other languages as well. Act LXXVII of 1993 on the rights of minorities declares that the use of the mother tongue has to be ensured to persons belonging to national or ethnic minorities in penal, civil and public administration procedures. The Act contains rules regarding the involvement of interpreters stating that an interpreter shall assist if the official does not speak the language spoken by the client or any other person taking part in the procedure. Translation of different documents are equally important in public administration procedure as it may have an essential influence on the whole course of the procedure.

In Hungary civil procedure is regulated by Act III of 1952 on Civil Procedure. Among the fundamental rules the Act provides for Hungarian to be the language but also says that no one shall suffer a disadvantage on account of unfamiliarity with this language. The act provides that anybody may use their native, regional or minority language. The Act differs from penal procedure in the sense that the fee of the interpreter is included in the costs, so the party that

is obliged to cover the costs has to pay for the interpreting. It is possible to dispense with the services of an interpreter if the client does not speak Hungarian but the court is sufficiently familiar with the language the client speaks. In this respect the Act on Civil Procedure differs from the Act on Public Administration Procedure because according to the latter an interpreter is needed even if the proceeding official speaks the given language but other participants of the procedure do not. In civil procedure documents are important, in numerous cases decisive. The Act on Civil Procedure contains comprehensive and detailed provisions regarding deeds.

Unlike civil procedure, penal procedure aims to enforce the punitive authority of the State and to apply the penal sanction. Act XIX of 1998 on Penal Procedure also ensures the use of native, minority and regional languages. A different provision compared to the Act on Civil Procedure is that the translation of a decision or official document ordered by law is the task of the issuing or executing court, prosecutor or investigating authorities. The party concerned may forego the right to have the document to be delivered translated. The costs of translation are included in the cost of procedure. In case the person obliged to pay is not able to do so a personal exemption can be provided.

In penal procedure the use of an interpreter who has not taken the relevant professional examination is an offence and may result the annulment of the verdict of the court of first instance if the restriction of the lawful rights of the persons taking part in the procedure had a serious impact on the outcome of the procedure.

Arbitration procedure is provided for by Act LXXI of 1994. As it is commonly known, arbitration may be an alternative to civil procedure. Arbitration procedure may be used in economic or commercial cases, where the presence and actions of foreign participants is of decisive importance. Consequently documents in foreign languages are used very often.

It is important to note that in international arbitration documentary evidence plays a major role. In addition the parties can agree freely on the language to be used in the arbitration process. If more than one language is stipulated, interpretation and translation need to be ensured.

In the international arbitration procedure two kinds of interpretation are recognized. One type is when the interpreter assists with the hearing of a witness and is not required to render a word-by-word interpretation. The other one is a word perfect, consecutive interpretation. Experience in international commercial arbitration does not support the use of simultaneous interpretation.

In Hungary Act IV of 2006 on Business Associations and Act V of 2006 on the Registration of Business Association, Registration Procedure by the Court

of Registration and on Final Settlement entered into force on 1st of July 2006. The language of these non-action procedures is Hungarian. Meanwhile foreign documents are often used in this procedure. The registration of business associations is in the public domain, it is therefore in the legal interest of businesses that the authentic Hungarian translation of foreign documents shall be available. In its annex the Business Associations Act provides for a number of cases where the authentic translation of foreign documents must be attached.

The next chapter offers a detailed description of the legal status and activity of the Hungarian Office for Translation and Attestation Ltd. (OFFI by its Hungarian acronym). OFFI is a company in long-term state ownership. Its legal ancestor, the Central Translation Department was established by the government lead by Mr. Gyula Andrássy in 1886 and belonged to the Prime Minister's Office. Its head was the linguist József Ferencz.

The year 1948 brought a significant change in the life of the Department. The Council of Ministers assigned the Minister of Justice to organize the Hungarian Office for Translation and Attestation. Its scope of activities was defined as follows: "1. Authentic translation of foreign language documents into Hungarian or other languages; either the full document or an important part thereof; 2. Attestation of a translation done by someone else; 3. Making a true copy of a foreign document; 4. Authentic interpretation".

OFFI became a business entity in 1950 and in 1968 it was reorganised as a company. The scope of services was further enlarged in 1982: an expedited service was introduced, which meant that the letters of invitation and donation needed for travel purposes were translated on the day of the order if so required.

After the change of the regime the role of the OFFI has become more and more important. OFFI assumed its current form on 25th April 1994 with a registered capital of 49.6 million forints and its seat in Budapest. Its scope of activities include four areas: 1) preparation of authentic translations; 2) language editing; 3) attestation of translations; 4) interpreting, whose main forms are as follows: liaison interpreting, consecutive interpreting (including court interpreting), technical interpreting (also known as interpreting for special purposes), and simultaneous interpreting.

Advocacy of interpreters and translators is undertaken by the Hungarian Association of Translators and Interpreters. Its members work as professionals and receive financial consideration.

Act XLI of 1991 on Notaries empowers the notary to issue a document in a foreign language if in possession of a relevant license issued by the Minister of Justice. However, the notary cannot attest a translation. Notaries' foreign language services cannot be equated with OFFI's authentic translation services.

The monopoly of OFFI regarding the preparation of authentic translation and attestation was challenged in the Constitutional Court, however, the Court refused the petition reasoning that neither the preparation of authentic translations nor attestation or the issue of a true copy is an economic activity but is rather a state function, which can be provided for a fee. Thus OFFI, a business association established by the State, is providing a public function.

The position of the Constitutional Court corresponds with the view whereby professional authentic translation and attestation are connected to a fundamental legal political and state interest and are performed on the basis of relevant statutory provisions. This unique state function is likely to be continued in its current system.

The well-structured book is easy to understand by the non-legal reader. The authors supply ample bibliography. This is a work that duly deserves the interest of theoreticians as well as practitioners.

Gábor Török

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Member of the European
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Research fields:
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KATALIN SZAMEL *

Legal and Non-Legal Aspects of the Reform Process of the Hungarian Higher Education System

Abstract. The essay surveys Hungarian higher educational reform in a historical perspective. Higher education is a special branch of public administration, where investment to human capital is of corollary importance even if the educational, research and fiscal autonomy of the given institutions is fully respected. The author investigates the legal aspects of how government oversight and supervision (as envisaged in the communist model) has been dismantled over the past 25 years in Hungary. There is no doubt: with the development of institutional autonomy, state subsidies decline and higher educational institutions need to make an increasing effort to simultaneously maintain financial stability, meet market demands and reverse the current trend of deterioration regarding the quality of education. It is for this reason that the negotiations between higher educational institutions and the state must remain within the legal framework so that government supervision will not transform into total neglection.
governance.

Keywords: Hungarian higher education system, autonomy, institutions of higher education, university, college, credit system, normative financing, student loan, Credit Council

Introduction: Higher Education–a Point of Conflict

Preparatory work done in the process of drafting new legal regulation within a specific sphere of the law almost always brings up issues beyond the given subject tackled, and brings into focus contradictions that exist within the entirety of the legal system. This is a problem for scholars–who approach the legal regulation of a given sector with a scientific attitude–because the scientist can see beyond the specific task at hand, and when given the chance to draft law will inevitably try to, at the same time, remedy other internal conflict that exists within the legal system. This is particularly true when the task at hand is the regulation of an area known to be a key sector of the economy, and the nature of the reform to be rolled out is such that it promises comprehensive change, which–if successful–has the promise of leading to a paradigm shift.

* Senior Research Fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H–1014, Budapest, Országház u. 30.
E-mail: szamelk@jog.mta.hu

It is no surprise that in similar situations the process of drafting law becomes closely tied to politics and becomes a point of conflict for politicians. In fact, the clash of interests that occurs in this phase can be quite beneficial to the process as a whole, because it can lead to an outcome that has a reasonable chance of being implemented in the end. It is far less fortunate if the process of legislation is caught in the crossfire of political animosity, and is faced with various interest groups strong enough to hijack the process, in the sense that their activity can lead to the neutralization of the most forward looking elements of the reform.

There is no doubt that the population at large has always been keenly interested–in fact has been looking forward to–the changes affecting higher education, and it could also be seen that those Hungarian intellectuals working as academics employed by public universities have long been successful at slowing the pace of reforms. This attitude is rooted in their understanding that the intellectual capital represented by the concentration of their expertise at the universities makes them the most apt, competent, and committed body fit for the task. This very palpable intellectual advantage led to the birth of a concept of autonomy, which in practice meant the attempt to minimize dependency on the state. This endeavor was more-or-less successful, and also had the added benefit of providing a reasonably effective shield protecting higher education from attempts at change generated from outside–and this was true during even perhaps in the most dictatorial of political times.

State-socialist management of higher education was–despite all its attempts–merely a never fully implemented experiment at making higher education uniform by way of breaking up and breaking down university autonomy. However, higher education possessed a strong enough lobby position to maintain its relative independence at all times, and even increase the level of its autonomy when the time had become ripe for these measures to be brought. The reason why it is important to bring into the discussion these early steps of the reform of higher education that started in 2002 (and its outcome as well) is that the genesis of the process is essential to understanding the nature of the contradictions the reform encountered after it was launched by the Hungarian Government in 2002.

Education Reform as an Attempt at Breaking the Monopoly of State Control

Law No. 1985. I. on Education was the first of its kind (enacted still in the time of state-socialism), in the sense that it was in fact reform oriented in practical terms, and not merely as a verbally declared goal.

By the 1970's (during the years of the so-called new economic mechanism, when several sectors were targeted for real change) renewal of education had

also become necessary. Serious reform concepts were formulated by the staff of various government ministries involved with matters of higher education, but it was only in 1984 that these were complied into a single program of development that could serve as the basis for drafting a comprehensive new law. (Those directives that tried to introduce change prior to 1984 primarily attempted to reform the internal structure of institutions of higher education, but failed because the institutions only formally implemented the changes mandated, or did not do so at all.) The final draft of the law was based on the concepts outlined in the program, and therefore contained a lot of important changes to what was the declared purpose, content, and methodology of education, and the way educational and pedagogic institutions operated. As a novelty, it contained the rights of students of various ages, and dealt with the relations between educational institutions and society–issues that had previously been outside the scope of legal regulation.

In 1985, when all levels of education were regulated in a single law for the first (and in fact also for the last) time, legislators attempted to draw up uniform principals and a common general section for the legal regulation of higher education and lower levels of education as well. This solution did not stand the test of time and proved unsuccessful from a legal perspective. This was due to the fact that both the internal management structures and outside control mechanisms of the two types of schools (lower and higher education) have different characteristics.

General public education traditionally has had a management structure that is not collective in nature (even though the teaching staff also participates, and at times parents' representatives and even students do so as well), rather it is based on a system of personal responsibility of a single director. In contrast, at institutions of higher education–despite having a single person responsible for the proper management of the school–most important decisions are made by committee.

Due to the fact that participation in public education is mandated by law up to a certain age, this branch of education has a relatively tight professional leadership control attached, which prescribes the substance of learning, in other words the material to be taught to students. This is true despite the fact that the degree, nature, and intensity of this leadership can vary a great deal, i.e. state regulation has varying degrees of detail and rigor. In contrast, higher education has traditionally been significantly freer in determining the content of what is being taught, in part because in this framework teaching is also tied to the principal of freedom of research (as a right of the academia). This makes it much easier for research findings to make their way into the textbooks and the substance of the curriculum, therefore larger discrepancies can be tolerated–

and are in fact desirable–regarding the knowledge acquired and views held by various university students. There are further differences in how these institutions are chartered and financed as well.

Nevertheless, the legal definition of common principles that apply to all levels of education uniformly was politically important, and the new law did in fact cause a significant system-level overhaul to start in the sphere of education. (For example, it lead to more ethnic minority rights being observed, the reinstatement of various faith-based educational institutions, and more forceful attempts at advancing university autonomy.) However, a negative aspect of this single universal law was that certain nondesireable concepts and institutions were fixed by it, and solidified enough to be more difficult to change afterwards.

It had regional political significance that the right was guaranteed by law for ethnic minorities to study using their native language at higher levels of education. There was another significant advance in comparison to the prior state of affairs, because for the first time a law declared the principal of professional independence for educational institutions, which was in stark contrast to state-socialist education policy, which–as stated previously–due to one of its main faults tried to force uniformity onto the system, (primarily in terms of ideology, but in other matters as well).

The law attempted to make the organizational structure of institutions orderly by doing away with certain types of institutions (e.g. post-elementary school training institutions) and also removed the so-called university-like colleges, and so-called upper-level institutions. In the end, only the college and the university remained as the two exclusive (legitimate) forms that an institution of higher education could be chartered in.

Following are the major regulations in connection with central administrative rights granting control over educational matters:

- A "central director" capacity was granted over institutions of higher education for what was defined as a "direct" ministerial capacity, and maintained the concept of a "minister involved in training". (The latter concept is based on the fact that institutions of higher education were structurally under various ministers most closely associated with the given sector, and did not belong to the ministry of education itself.)
- Building on the experience that the minister benefited a great deal in his/her director capacity from the support provided by expert-collectives, the law prescribed the participation of expert-committees with regard to certain activities of the directing ministers.
- Proposal to widen the sphere of 'maintainers' (i.e. institutions chartered by entities other than the state), but gave no further detailed regulation, instead turned the responsibility for the resolution of the issue over to

the Council of Ministers, with the added remark that–in general–the chartering of a new institution is conditional on the authorization of the Minister of Culture (who was–despite the often changing contemporaneous name–also responsible for education matters).

It was a significant change in the status of institutions of higher education that their professional independence was guaranteed at the level of law. The law took into account this principle and the duties of institutions of higher education when it determined the key areas of independence, which included the right to independently decide the substance of education, to organize scientific research programs, and to manage student matters with a large degree of independence; matters that institutions of higher education were required to manage based on their own fixed rules. According to the letter of the law, it is also a guarantee of independence that institutions of higher education gained the right to voice an opinion in all matters where the decision making power was the competence of the directing minister or other superior administrative body. In addition, institutions of higher education had the general right to make proposals; furthermore, the directing minister had a duty of passing on relevant information to institutions that would be affected by certain planned measures.

Management of institutions of higher education was split between the single person at the head of the institution–who carried overall liability for the general operation of the institution–, and various advisory committees; and in practice was their joint task. There were two different types of bodies that operated within institutions of higher education: representative councils and professional boards. Within the framework of separate legal regulations, institutions of higher education had the right to determine the makeup of both kinds of bodies, set the ratio of elected and appointed (invited) members; as well as the rules according to which these were set up and operated. The purpose of setting up professional bodies was to function as professional forums gathering expertise to support the interests of the institution and its educational activities, to foster productive interaction between theoretical and practical work, to organize and manage scientific research projects within the institutions, and to promote the interaction of various institutions of higher education. The professional bodies were not mandated to substitute representative councils, but were allowed to voice an opinion in professional matters, and the option was open for the professional bodies to be granted decision making power in relevant matters.

The law contained provisions regarding the legal relations between host institution and student (at all levels), including regulations related to disciplinary liability; and it was an important new guarantee in the law that a rule allowed students to petition for the review of decisions handed down by institutions in disciplinary matters.

All things considered, the reform process that started in1985 was a significant breakthrough: it lead to substantive change, as well as structural change, and in this sense these measures enjoyed longevity for some time to come. Undoubtedly, the 1985 reforms had the intention of decentralization. Twenty years ago this was an important achievement, if for no other reason, because it lead to a breakthrough in what had been an over-centralized education system. Nevertheless, it did not resolve certain fundamental issues. For example, there was no rule on how an institution of higher education can be chartered, so this–in practice–could only be done by maneuvering around the legal regulations, admission of new students (enrollment) was left open for central interference, therefore the inevitable subsequent growth of the student population was not backed by provisions for the necessary prerequisites of the enlargement.

Political Changes and Continuity

The 1990 change of political systems made the revision of all legal regulation providing the foundation for the operation of the education system necessary. It was in 1993 that the first post-change law was enacted, which dealt with higher education separately. This was a reasonable development not only based on the premier role higher education had been playing in the general development of the country, but also due to the growing signs within higher education of a need for increased autonomy coupled with louder voices against state intervention. Additionally, there was great need shown for the freeing of the system from the measures limiting the size of the student population, which had long been a practice of the central administration. Even though parts of the reform concept–which also took into account international trends–were ready as early as 1988, and by 1991 a detailed concept[1] had been developed, but the debate over the concept (which was held in the widest possible sphere, and included all members of the teaching staff at institutions of higher education) slowed the process of drafting a bill a lot.

There was significant resistance to the change, which restructured the system so that all institutions of higher education would belong under a single central managing organization (the government ministry in charge of education). This did affect the institutions financially, and as it would later turn out, they were affected negatively. The student population also became an active participant in the

[1] Concept for Higher Education Development in Hungary. Budapest, 1991. Szamel. K. (ed.): *A felsőoktatás és az állam* [Higher Education and the Government]. Budapest, 1990.

preliminary debate of the bill, and their representatives lobbied hard to get the right to participate in the making of executive decisions in higher education. It turned out to be difficult to create a concept of a new financing protocol; specifically, the issue was: how to accurately calculate the true cost of higher education. Another objective was to find a way to cause the government to start treating higher education as a true priority (as opposed to the prior neglect), and at the same time result in higher education not being so dependent of central will.

The preparatory work of this bill coincided with the constitutional and administrative reconfiguration of the Hungarian state, which was not a smooth process, nor was it particularly well planned in advance at the conceptual level. The time around the political changes was charged with an energy driving public administration in general towards a more decentralized model, which–at least at the beginning–affected legal regulation as well. This was primarily true at the level of local governments, but was also signaled by the fact that tasks previously accomplished by central administration were gradually transferred to other, autonomous organizations–NGO's such as public bodies, chambers of commerce, professional organizations, public foundations, etc. (A later reaction to what would prove to be an undesirable overachievement in decentralization was administrative recentralization, i.e. the reduction of the level of self-governance.)

Autonomy became a sort of mantra all across Hungarian public administration, including the education sector, which was a natural reaction to the previously centralized system. In other words, this means the ridding of the education system of state influence, at least in theory, i.e. allowing the schools to be independent of central public administrative decision making in substantive and organizational matters alike, and it also means the strengthening of the internal leadership, as well as the role of teachers, academics in the internal governance of the institutions.

So the 1993 regulation was focused on autonomy. The autonomy model adopted by the law was the "traditional" one based on the principal of freedom of research, to which the freedom of teaching was attached, (this is the so-called Humboldt university model). This model of higher education is based on the understanding that the autonomy (self-governance and independent management) of institutions of higher education as a rule is based on the constitutional provisions guaranteeing the freedom of learning, teaching, and scientific research, in addition to the constitutional principal of unity of teaching and research. This is so because these freedoms granted by the constitution have the best chance to be applied in practice within the framework of a system, where decision-making powers largely rest with those entitled with the specific

constitutional rights. A contrary system that has an opposite nature (such as public administrative-type management) can easily become desensitized and inpatient when it comes to violations a freedoms, and easily turns to unreasonable restrictive measures when attempting to achieve its goals, (not unlike several cases from the historical past, including especially the decades of the state socialist regime).

Institutions of higher education pressed hard for a right to participate in high-level science training as well as the power to issue science degrees (e.g. PhD, habilitation), a right that they–at the time probably somewhat overreaching–tried to secure for themselves as an exclusive title granting them sole power over these matters. In essence the institutions laid a claim on the reinstatement of rights they enjoyed prior to the state-socialist regime, rights which starting in the 1950's (based in fact on the Soviet model) were given exclusively to the Hungarian Academy of Sciences, although not barring the participation of university professors either.

The law provided the necessary framework for the practical application of yet another constitutional principle, when it prescribed for the state (as one of its duties) that it make higher education available to all citizens according to their abilities. In addition, it made the state responsible for providing financial support for this endeavor, and it made the government's duty to constantly develop education and guarantee the appropriate conditions for its operation. It was a particularly important mandate that the quota of admitted students be raised in relation to the entire young adult population, because the approximately 10% participation ratio characteristic of the Hungarian system of that time was considered to be low not only compared to Western and Northern European averages, but in the country's own regional comparison as well. The proposed increase in the number of people admitted into the system of higher education was not just a whimsical notion, rather it was based on the rather sure bet that the infusion of more highly qualified professionals into the workplaces would bring about the growth of the economy, more precisely growth is a hardly manageable target without more experts with up-to-date knowledge. The education system also had to be tuned to the developments of European norms–a moving target itself. In order to make that work, the Hungarian higher education system had to be restructured with the addition of new, more specialized fields of study and corresponding narrow curricula, taking over from the domination of fewer choices of majors that had been providing a more general blend of knowledge.

The law maintained the two basic types of intuitions of higher education. i.e. the university and the college, which basically differ in the nature of the programs and their relative length. (Universities provide a primarily scientifically-

oriented education that normally runs five or six years, while colleges orient their programs towards practical training and issue degrees after three or four years of full time study.) Even at that time the proposal to get rid of the college category was on the table, but the 'college lobby' found support in foreign countries and managed to influence decision making inside the Hungarian Government.

An institution of higher education could either be a state school, or school sanctioned by the state (a non-state school is generally run by a foundation or by a faith-based organization). Nevertheless, the difference in ownership status did not automatically attach the duty for non-state schools to finance their operation, as all institutions presented a need for the state to finance their activities. (In connection with the constitution's guarantees of religious freedom and freedom of personal conviction, the law gave separate rules for those non-state universities and colleges that provide theological training. Faith-based educational institutions, however, started other types of programs as well, based on the somewhat weak argument, that they are in fact performing the duty of the state by doing so, because education is in high demand, and state schools do not admit sufficient numbers of students.)

It was also at this time that in response to the demands made by the institutions of higher education all of them were listed by name in an appendix of the law. The institutions hoped that this high level of state sanction would automatically be a guarantee of financing for them. However, since there was no set rule on the procedure of founding new institutions of higher education– true in the case of even the state schools –, an unusual trend developed. The state would add to the appendix (listing institutions of higher education) those institutions that already had come into existence and were already functioning, (and each time this required the legislative act of amending the law). It was therefore no surprise that a virtual rush started to charter new schools as a result of the new law, and it should have been no less surprising that the central budget of the state could not keep pace with the exponentially ballooning financial burden the fast paced quantitative development brought.

The law made it the competence of the Government to set the rules for degree-requirements, and the right to approve the starting of new programs and the cancellation of existing ones in so-called 'basic training' (undergraduate core curriculum). The rationale behind this decision was that this was supposed to guarantee a desired level of uniformity of the requirements among various institutions of higher education offering the same kind of degree program. Additionally, this was to be a proof and state guarantee of the value of diplomas for citizens, and was to contribute towards the future goal of international recognition of the diplomas issued by Hungarian schools (equivalence). In

practice, this measure, which was meant to offer guarantees, lead to a flood of new regulation, which it turn ended up making the entire system too rigid. This would prove to be a hindrance in the effort to update the substance of the education programs. Furthermore, the attempt at making degree requirements uniform across schools offering similar programs slowed the work, as it was difficult to find a consensus, and harmonize the various needs of different institutions in a single government decree. The launching of new departments was also a complicated matter, yet the logic of the system was such that it encouraged institutions to establish increasing numbers of new departments, because doing so could be used as yet another way of making the case for getting access to state financial resources. (Logical sequence: new program need, authorization of new department, new additional enrollment capacity added, additional normative financing from state budget issued based on the number of students admitted.)

The 1993 law called into life the common bodies of central administrative organizations on the one hand and the autonomous institutions of higher education on the other, and an intermediate body called the Higher Education (Scientific) Council, as well as the (Hungarian) Accreditation Committee.

The Higher Education (Scientific) Council had–and still has–a very important right to define priorities of development programs affecting the whole of the higher education system, and has influence over scientific research activity done in the framework of higher education, and over the higher education institution system's organizational structure, as well as student population quotas, and last but not least advises the state on the budget of higher education. The Higher Education (Scientific) Council is well balanced between universities and colleges, and this body also includes all government ministers involved in education, outside professional experts, representatives of cultural institutions, economic players, and society at large; parties that were supposed to represent the needs of higher education, and those financing and taking on the output of the system.

In this period of higher education reaching a mass scale it was particularly important that quality be upheld with regard to all aspects of the various tasks of institutions of higher education, so that the value of the service provided by a particular school be measured by the comparison of the set requirements obliging the school to perform well and the actual results related to their performance. The premier guarantee of the high quality of higher education is (coded into) the system itself, therefore procedures had to be devised, a system had to be created that made it possible (and in fact mandatory) for particular institutions of higher education and the community of institutions of higher education to routinely use the tool of self-evaluation; and additionally, procedures that would allow the latter to make a contribution to the preparatory process of

governmental decision making. Based in part on foreign models, the law called into life the Accreditation Committee, which is made up of domestic and international experts, local and foreign members of the Hungarian Academy of Sciences, and additional expert bodies' representatives. They jointly evaluate the system's functioning and also set the key values that translate into priorities for its development. Once the Accreditation Committee was established, a comprehensive evaluation process, a sort of general fact finding audit of all institutions of higher education followed, which resulted in the issuing of accreditation certificates representing proof of quality (institutional accreditation).

It was probably due to the attitude inherited from the previous political system characterized by decades of dictatorial rule that the properly devised accreditation system was in practice quickly corrupted into a lobbyist club, a sort of mechanism serving interests of those better-connected institutions in the battle over support. Actual quality was replaced by just the proof of quality, and those institutions with lesser political capital and weak networking activity were left behind in the competition for financial resources allocated to development.

In practice, neither the accreditation procedure, nor the operation of the Higher Education Council had fully developed operational rules providing proper guarantees, therefore only the government minister's right (tied to the obligation of an explanation) to change the decisions made remained as a possible recourse or protection for those institutions that were negatively affected by a given decision. However, since even this ministerial overrule procedure was not fortified with unambiguous legal regulation, this institution only increased the level of unpredictability of the decision making process, instead of providing true guarantees.

The law was meant to have another type of guarantee for the protection of institutional autonomy. The Constitutional Court was given jurisdiction over matters where the state was suspected to have infringed the rights of institutions, yet in practice this institution proved to be just a threat of sanction with some chilling-effect on would-be violators of autonomy, because although most decisions handed down by the Constitutional Court would rule in favor of the party seeking an injunction, nevertheless it had no real power to remedy the unconstitutional situation.

The law also gave specific rules on the internal structure of the institutions, including the legal framework of the management configuration. The university had a single person in charge, the 'president'–so in this case the system remained unchanged–, and the college was led by a 'head director'. Even though financial matters were assigned to a financial officer, nevertheless the head director remained the person liable for financial matters as well. While

this made the finance department subject to interference, it did not on the other hand mean that the president could in fact be held liable in case of financial misconduct.

In the defense of autonomy, a much more robust protection would have been to have subjected those decisions made in a state administrative capacity to the rules of state administrative procedure. However, the law left this question open, therefore these decisions not clearly defined as being issued by an authority could not be voided in a state administrative legal action. (Even the 2005 law only managed to remedy this problem in part.)

The various representative bodies–primarily the (university, college) Councils–got a significant role in the management of institutions of higher education. Students' representatives also had a presence in the Councils, and their participation was not merely symbolic, as they held one third of the seats. Even at the time of this rule going into force it was understood, that the presence of student representation was desirable only in those cases when the presented issue was related to students' rights. However, pressure from society was strong enough (in favor of giving more rights to students at the time) to make the stance that would have curtailed these rights politically unacceptable; because that was the norm at this early stage of the process of building a democracy, when all actual (or predicted) faults could still be attributed to a 'general lack of democracy' in the system.

It was another important feature strengthening independence that the institutions were allowed to write their own rulebooks. The government minister in charge was given the authority to act as watchdog over these rulebooks, making sure they were in accordance with all legal regulation, and it was also the minister who had the power to annul any rule that was in conflict with the law. This power was not, however, tied to any time limit; therefore the minister could expunge any institutional rule at any time. In case of the rulebooks, the rationale behind not including a statute of limitations was that it was expected that after the law was enacted all institutions would write their own rulebook more or less simultaneously, making the only viable oversight body–the government ministry–scramble in an effort to try meeting a deadline in its effort to fulfill its controlling duty. It was not particularly the case of the rulebooks that made the lack of a deadline problematic, rather it was in the case of other decisions that this posed a question of harmony with rule-of-law-state requirements, because this led to uncertainty. (For a short period between 1998 and 2000, an amendment of the Higher Education Act did contain a statute of limitations connected to this area, but this too was later taken out of the text. The decision making process surrounding this issue also had a background in politics. However, since the background story of this process is tied to particular individuals

rather than theoretical considerations, a description of this matter would be immaterial to the present discussion.)

It was due to the 1993 law that the institution of the tuition fee was introduced into the system of higher education–even though this was only a short-lived measure. It is somewhat difficult to understand why the administration unexpectedly cancelled the merely symbolic amount charged as tuition just at a time when following the initial upheaval, the population finally accepted the new measure. Instead, a significantly more unfair institution was introduced, the so-called 'expense-compensation' system, which affected only those applicants who did not get one of the limited number of state financed enrollment places,[2] but were willing and able to pay a fee in the compensation-based system. (This fee is approximately fifty times the amount of what the original tuition fee used to be, and even at the time of its introduction it was twenty times higher than the universal contribution all students had to pay previously.) In practice, the expense-compensation money is just a supplemental income for institutions of higher education. As a legal institution, its validity is highly debatable, as it is not at all obvious that it is not discriminative, that it does not violate the standard of equality, although the truth is that it works.)

The law–by granting the right of association–created a conducive environment for the fruitful interaction between institutions of higher education and their social environment (especially other scientific institutions, various institutions of the Hungarian Academy of Sciences in particular), and in theory opened the way for institutions of higher education to join one another. (In this context, the word join refers to a completely open legal institution, and from the perspective of legal dogmatics it could probably use a degree of clarification, but since it is also included in the 'local government law', it is clearly understood to be one type of a public law contract, and is definitely not a type of civil law enterprise. Today it is known in the law as the 'cooperation agreement'.) Voluntary cooperation started among institutions based on the law, but without fusion. This would probably have continued, had it not been for the so-called 'integration' started in the meantime by yet another new initiative of the state, leading to several fusions of institutions.

[2] Institutions of higher education administer an entrance examination and those applicants scoring high enough to rank them in the top percentile–a number determined by various factors each year–get admission with an automatic full tuition scholarship attaché.

Yet Another Attempt at Reform, which Forces Development, by Decree, Instead of Supporting It

Between 1993 and 1996 there were several attempts at writing a White Book of Hungarian higher education. Several groups laid their proposals on the table, but they could not in the end come to an agreement. The 1995 Parliament Resolution on the priorities of the development of higher education (107/1995) was a significant step forward in the right direction, which did in fact serve as an action plan for a few years to follow. During this short successive period Hungarian higher education had some well-defined general objectives that unified the development process across the sector.

A comprehensive set of modifications was applied to the Higher Education Act in 1997, which caused some irreversible changes to occur.[3] It was during this period that the *so-called integration of Hungarian higher education* passed the point of no return, i.e. the fusion of various independent institutions (comprised of several departments that were located physically close to one another) into a single organizational unit. *In 1996 the government ministry in charge of higher education was assigned to the liberal party, and it attempted to conduct this process with the financial support of the World Bank and intended to closely tie it to the general development of higher education, but unfortunately the reform had to be done in the absence of this outside capital infusion.* Integration–although without being based on the necessary infrastructural investment–did go through in the end. During the summer of 1999 Parliament reconfigured the Hungarian higher education institutional system, which caused the overall number of existing institutions to be halved as of January 2000. (In May of 2003 there were 18 state-run universities, 12 state-run colleges; non-state run institutions of higher education were represented by 5 universities run by faith-based organizations, and 21 colleges run by faith-based organizations; and additionally, there was 1 public foundation-run university, and 9 foundation-run colleges.)

The introduction of a requirement making the preparation of so-called 'institutional development plans' mandatory for individual institutions was an important development, as it forced higher education in general to do complex and detailed strategic planning. Mandatory strategic planning made it possible for the newly integrated institutions to list their development objectives comprehensively, to

[3] These changes are compiled in a textbook prepared for a particular public administration specialty exam Szamel, K. (ed.): *A felsőoktatás igazgatása és tudományirányítás a felsőoktatásban* [Management of Higher Education and Science Management in Higher Education]. Budapest, 1998.

define the strategy they propose to fulfill their goals, in essence laying the groundwork for the process of securing the necessary financial resources. A negative side effect was that not all decisions were made independently, i.e. in line with organic development; therefore its truly positive advantages could hardly be sensed. Furthermore, it caused a psychological backlash rather than a positive attitude to emerge, nevertheless from the perspective of the state it brought the advantage of having to keep track of and contact with fewer institutions.

Another lasting legacy of the 1997 amendment of the law was the introduction of the *credit-system,* and not just any system, but one conforming to the principals of the European Credit Transfer System (ECTS)–a measure that undoubtedly had distinct advantages from the perspective of future development.

This was also the period when the transitioning to the so-called *normative financing* protocol occurred, which was based on a combination of the specific number of enrolled students and the cost of providing higher education in the given specialty field. The openly declared rationale behind this move was that this system intended to secure the appropriate level of financing for the institutions from the central budget, based on separately defined numbers for each specialty field. This was done despite the fact that this system was already known to be outdated even at the time of its inception. The system was so poorly designed, that it caused the amount of per capita financing within the student population (corrected for inflation) to be halved by the end of the following ten-year period.

The *student loan* system was also introduced after 1998, as the size of the student population enrolled in higher education was steadily increasing. One of the most important characteristics of the Hungarian higher education system in the period before 2002 was the exponential increase in the number of people wanting to participate. (There was a marked increase between 1998 and 2002, as overall enrollment numbers rose by more than 30%. The total number of students enrolled in higher education almost quadrupled between 1990 and 2002, although it has to be added that almost half of the currently enrolled students participate in the expense-compensation system, i.e. they tmesleves are responsible for the cost of their education, and the state does not cover them.)

Between 1990 and 2002 the total size of the academic staff grew from 16,319 to 23,151, i.e. the increase was only 42%. When this figure is related to the size of the student population, it shows that the instructor/student ratio grew from 6.2 to 16.5–a number that is similar to the ratio found in the European Union.

The dual nature of Hungarian higher education remained unchanged, i.e. college and university education continued to coexist in parallel universes, because they did not line up in a sequential system (as undergraduate colleges,

and graduate programs at universities do in some foreign systems), and their share of the student population remained stable at an approximate even split.

There were several additional components of the reform that could be mentioned, which had only a short-lived positive effect immediately following their inception. These were either not very chiseled legal solutions even in the original form they were passed in, or they became dysfunctional after some time, and thus they contributed to lessening the overall affect of the original intentions. *The system's response to these anomalies was a never-ending stream of additional measures, which in part led to positive reform steps, but in part had only a temporary-patch nature.*

The state administered, top-heavy reforms that occurred in Hungary, and the increased autonomy, but lack of strict state supervision led to the undesirable survival of trends that should long have disappeared had a bona fide market economic model been successfully implemented in higher education.

- Instead of making their programs more up-to-date and their operations financially more viable, the institutions concentrated on increasing enrollment numbers, because they understood the somewhat inflated student body to be the key of their economic survival. This was logical thinking on their part, since the system of financing encouraged them to do so.
- The "hunger" in society for diplomas masked the alarming trend that 'diploma factories' could continue to operate with sate financial backing, despite the fact that they did not follow the logic of the market, instead were based on a statist model of a pseudo-market; a market deformed by the state.
- These circumstances caused the state to end up having to do the work of patching up the system's faults; therefore dependence on the state remained a fact of life in higher education, while referring to autonomy could defeat reform proposals.
- It is no overstatement that the functioning model evolved into a routine of micro-management, where the system was governed via direct contact between the Ministry and the institutions, the integrity of which the Ministry tried to maintain by trying to remedy problems that were the results of errors at the core of the system itself.

Has Hungary Really Joined the European Higher Education Area?

All successive administrations were aware that development of higher education would require additional financing, but none were able to make this go through during annual bargaining over the numbers of the central budget. The

overstretched central budget could not allocate resources to the continuous development of the infrastructure of higher education, since it was already carrying the increased burden of financing the operational spending of the bloated system, filled with a growing number of students. Solutions had to be found that would release the system of higher education from the pressure of being a plaything of the annual fight over the budget, and thus manage to relatively stabilize the position of the institutions of higher education. Undoubtedly, this was one of the motivations behind the new wave of reforms that started in 2002. *So the reality was that solely the Bologna Declaration or the Bologna Process did not initiate this reform, but the system itself needed comprehensive change regardless.*

When the Ministry of Education launched the *Accession to the European Higher Education Area project* (CSEFT) in September of 2002, the Minister's intention was to comprehensively audit the system in order to identify its deficiencies and create an action plan based on this investigation, which lists the new targets. The review process involved dozens of renowned experts, each with decades of experience in conducting research into the workings of higher education systems. The several thousand pages of findings included the review of all problems of higher education, and the group made the case for starting a comprehensive and truly radical reform process. In the end, after running its course for about two years, its scope went beyond a certain level and became more particular in nature than what could be regulated at the level of law. The program grew to be a set of programs affecting higher education as a whole.[4]

Several inventive solutions were found in the studies submitted as part of the process of formulating the final concept, but the time was not deemed right by the Ministry of Education for these to be put into practice. Consequently, these tasks were left for the new education cabinet to be formed after the 2006

[4] *Magyar Felsőoktatás* [Hungarian Higher Education], 2002. 7., 8., 9. contain a series of submissions on the topic of the Bologna Process. Available online at http://www.ph.hu/ph/mf/index.html

Barakonyi K.: Sorbonne-tól Prágáig: A „Bolonyai folyamat" I. [From the Sorbonne to Prague: the Bologna Process I.], *Magyar Felsőoktatás*, 2002. 7. 19–21; Dinya L.: A „Bolonyai folyamat" a duális képzési rendszer szemszögéből I. [The Bologna Process from the Perspective of the two-cycle education system I.], *Magyar Felsőoktatás*, 2002. 7. 24–25; Dinya L.: A „Bolonyai folyamat" a duális képzési rendszer szemszögéből II. [The Bologna Process from the Perspective of the two-cycle education system II]., *Magyar Felsőoktatás*, 2002. 8. 22–25. CSEFT: http://www.univpress.hu/data/cseft.pdf; *The Bologna Process*: http://www.aic.lv/ace/bologna/Prg_berl/join_mas.pdf; *Components of the Hungarian Universitas Program:* http://www.aic.lv/ace/bologna/Prg_berl/join_mas.pdf

parliamentary elections to tackle. The new Minister did not reject all these proposals, and therefore some of these leftover ideas were implemented.

The formulation of the concept started in 2002 with a critically-minded and unabashed evaluation of the contemporaneous situation, and at the same time the question had to be answered: to what degree does the Hungarian system harmonize with European trends?[5] During the work such an arsenal of solutions was laid on the table for various problems that their abundance was surprising even for those involved in formulating the concept. *The preliminary work was being distilled into a uniform concept during what was a somewhat difficult process, as many equally important components were vying for a final place in the text of the draft law.* On the one hand, experience showed that reforms changing too many elements of the system at the same time ended up failing, on the other hand some other changes would inevitably require several additional changes to be made in sequence. Changes are best carried out not simultaneously, rather following a predetermined timeline, i.e. according to a pacing that is relatively slow, but one that can potentially prevent the trend of faulty measures making their way into and remaining in the system from continuing, as had often been the case with previous reform attempts.

Making this a priority, the draft went through several revisions and compacting, and–as expected–several elements lost some degree of their "radicalism".

The forecasted cuts of the education budget to be the expected trend in coming years certainly do not infuse the higher education sector with a large degree of optimism, because even the most narrow program that can be seen as being of reform-quality would require spending that is not at all secured in the current economic environment in Hungary. Consequently, event though the reform would likely produce savings in the long run (as it did in several other countries), directors running the various institutions of higher education in Hungary only sense at this time that the state is gradually withdrawing from financing higher education instead of increasing investment, and in this sense abandons the institutions.

[5] Hrubos, I.: A felsőoktatás intézményrendszerének átalakulása a fejlett országokban [Development of Higher education Systems in Developed Countries]. *Európa Fórum*, 1998. 1. 21–34; Structural Problems of Higher Education Systems in the Age of Mass Education. In: Temesi J. (ed.): *50 éves a Budapesti Közgazdaságtudományi Egyetem. Jubileumi ülésszak* [50 Years of the Budapest University of Economic Sciences, Jubilee Session]. Budapest, 1998. 1522–1530; Hrubos, I.: *Transformation of the Hungarian Higher Education System in the 1990's.* Civic Education Project. Discussion Series 1999. 2. 13.

The actual goal of formulating a 'development concept' is–even if it is to serve as the foundation for the future bill to be passed by legislators–is not to produce a polished text with legal instruments formulated with exacting detail. Instead, the goal is to produce material that can then be converted into a legal form of the reform. Even though the program that was formulated did in fact take into account the legal framework, and its makers were aware of the limitations the system itself would pose from the perspective of implementation, nevertheless they focused their attention not on identifying these potential sources of conflict, instead these experts worked hardest on substantive matters, which were related to actual developmental questions from the perspective of education.

The bill (new Higher Education Act) based on the concept was eventually passed in 2005, which caused paradigm shifts to occur in the following areas, discussed below:

1. Most important is the transitioning to the multi-level system (cycles). The greatest challenge with this was that traditionally in Hungary, the dual-system was not organized according to vertically integrated tiers, rather the two systems (the college, and the university) were issuing parallel diplomas at the same level of certification. This was the base system that had to be reformed so that even the three-year (college) programs could qualify as acceptable prerequisites (foundations) for graduate-level programs issuing master's degrees. There were also the added objectives (due to financial considerations) that theoretically all students ought to be able to potentially go onto studying at a master's level, but in practice only the more talented students should actually get into a master's program, which was financed at a higher per capita rate. It is difficult to define specific numbers in relation to this objective, but the law, nevertheless, managed to fix the number of students going onto the second tier of training at approximately one third of the number of students graduating at the lower prerequisite level. This was at least the criterion for centrally financed enrollment places.

Even though there was intense objections to accepting the changes in the beginning, it seems that by now most institutions have accepted the Bologna education method, and have either registered to participate in the system, or have a registration process of their so-called Bologna Departments underway.

In addition to the two basic tiers (or with the post-graduate training the three training cycles) there are several supplementary forms of training providing further specialized knowledge or additional expertise in a shorter period time.

According to the law, even colleges are certified to conduct training and to issue diplomas at all levels, but in the long run it is predicated that the dual-

system (of parallel institutions) will cease to exist (because it will lose all rationality), or alternatively the nature of colleges will change: (instead of being specialized-science-oriented institutions they will likely become training centers offering a more practical-training-oriented education.)

The set of reform measures *necessitates the updating of the credit system.* At the present time, the Hungarian education system does not fully take advantage of the true value, or the full potential of the credit system. This is yet another proof that if a certain new measure–even if it is a very rational and progressive one at its core–is introduced into the system without the affected people who work in the system truly sensing the necessity of it, then the state mandated changes only produce hollow results that are more for show than bona-fide change, therefore the desired results leading to increased rationality are usually lacking in the end. One could identify important socio-psychological characteristics here, if this were a relevant subject matter in the present discussion, but it is more important in this context to state the fact that in the end it was not a fruitless and completely irrational measure on the part of the state to force the introduction of the credit system, because its 1997 launching has by now led to positive results. Already, it has demonstrable advantages from the perspective of the students: in the event a student does not meet the prescribed requirements in a particular academic year, it does not automatically result in having to repeat the entire academic year, rather the system is able to accommodate individual differences by taking into account personal disadvantages as well as evaluating progress on a student by student basis. In order for this to work properly the system must be developed further, but at least the foundation of a properly operating system is now in place.

2. Reform concepts formulated in advance of the 2005 Law were guided by intentions to fundamentally change the system of *financing* in such a way that it would secure the long-term continuous functioning of higher education, and somehow cover gaps in financing where the state does not provide the necessary funds. The original reform concept was that admitted students would receive their share of state financial aid via a "virtual student-voucher", which also functions as a sort of state financed loan, and is to be paid back to the central state budget over the course of a graduate's professional career. This would have secured the necessary additional financial resource that the system had always been lacking. The long term repayment scheme–as things stand today–has been neglected in favor of introducing a short term institutional financing scheme, which is essentially based on the premise that students are to contribute to the cost of their education, which can be financed optionally by taking out student loans. Nevertheless, free higher education is tied to

performance (a set GPA), and even in its current form covers only ten percent of the student population.

There were other inventive solutions proposed as well, starting with the premise that the state's inability to finance the system would be overcome by a sort of delayed privatization, but this solution was deemed unacceptable in the end not only by representatives of higher education but by politicians as well. This proposed solution had only a very slight representation in the final text of the law as it was passed, and this was in the form of the right to acquire real property being expanded to include state financed institutions of higher education as well, although with the limitation that their purchases can only be financed with revenue derived from their own entrepreneurial activity. (Some believe even this limited right to be an extremity, as they hold that privatization should have no place in higher education even at a conceptual level.) The 2005 law, however, allows the transfer of the right of a maintainer to finance a particular institution.

The idea has been repeatedly proposed that the legislature ought to pass a separate higher education financing law, since an increasing portion of the current Higher Education Act is taken up by the regulations related to financing, which are all executed via government decrees, whereby the rules, in practice, change with annual regularity, to make it possible to break down the annual budget according to current needs. This creates an uncertain situation for the institution, which encourages them to spend without prudence, because they cannot rely on a long-term predictable cash flow guaranteeing that development projects they start would have finishing funds provided by necessary budget appropriations. Perhaps the time is still not yet ripe for this new system of financing to be implemented, but there are attempts at formulating a new 'credit-financing' system based on funds allocated according to credit units.[6]

The poor balance sheets of the institutions made it unavoidable that rules be formulated providing additional economic freedom for intuitions of higher education, allowing more financial leeway for them than what was the norm for other budgetary organizations. As of 2003, the State Finance Act includes a rule that allows individual institutions of higher education to internally reallocate financial resources they are apportioned in the central budget; furthermore, they are allowed to keep and accumulate moneys not spent in a given year, to maintain a separate account for revenues they themselves generate,

[6] Temesi J. (ed.): *Finanszírozás és gazdálkodás a felsőoktatásban* [Financing and Financial Management in Higher Education]. Budapest, 2004. 443; Polonyi, I.: *Oktatásgazdaságtan és oktatáspolitika* [Education Economics and Education Policy]. http://www2.zskf.hu/media/oktpolea05.ppt

to conduct entrepreneurial activity free of taxation, to sell real estate for the financing of development projects, to set up a venture fund, and to take out loans. The law regulates the setting up of a provision of cover fund, which is a legal form created for the combined participation of multiple institutions of higher education wanting to conduct infrastructural development projects. (Since this was already regulated in 2003, the new Higher Education Act of 2005 incorporated rules that already existed.)

3. Another important issue that needed resolution was the *organizational reform of the state management and oversight structure and its ways and means.* The concept the law was based on included radical reform proposals in this area as well, which not only affected the competency of Parliament, the Government, and the Minister, but also proposed that the legal framework of intermediate bodies be more exactingly and narrowly defined. Above all, it attempted to more unambiguously define the scope of competency of each such body, giving special attention to ridding the system of redundant parallelisms, ending the trend of the decisions of the Hungarian Accreditation Committee (MAB) having administrative authority function, and the restricting of the advisory function of the Higher Education Council to just economic issues.

Since administrative authority functions were not native to the original tasks of the accreditation committee (as an accreditation committee is charged with certifying quality and not with authorizing operation), it was logical that these functions would have to be charged to another organization, even if this had the unpleasant consequence of having to set up an additional new body, in order to avoid the situation, where the organization that would hand down decisions related to operational matters would be of a kind, which was producing decisions that could not be overruled. Therefore, some of the administrative functions of the education sector were assigned to the competence of the new registration center. These matters fell under the rules of state administrative procedure, and had a judgment of first instance power.

A new characteristic of the law is that procedures related to the operational matters of institutions of higher education–from the chartering of a new institution to giving tenure to a university professor–are regulated in detail, including exact definition of the tasks and competence-limits of those participating in the process, as well as the similarly detailed regulation of legal redress. Some of the administrative functions of the education sector were assigned to the competence of the new registration center. These matters fell under the rules of state administrative procedure, and had a judgment of first instance power.

The following were entirely new organizational tasks: quality management, higher education information system, operation of the career-tracking system;

and the institution of the Office of the Commissioner for Educational Rights, and the Mediation Service for Education (OKSZ). The legal oversight of the operation of the maintainers of the institutions is allocated to sector management (Government Ministry), while the legal oversight of the institutions themselves is a right of its maintainer.

There were conceptual conflicts surrounding the management function of the maintainers and other management rights residing with state management agencies. The new law had to resolve these conflicts by sharply demarcating the various competences and clearly assigning rights to just one sphere or the other without overlapping. The maintenance and management tasks of institutions of higher education include the chartering, the closing, and the reorganization of institutions; the right to regulate budgetary issues, to set operational rules, the right to perform the duties of an employer, the right to make appointments, as well as the guaranteeing of lawful operation, and institutional autonomy. These tasks of the maintainers are uniformly described in reference to all institutions, whether they are state-run or not.

4. The concept that was the foundation of the 2005 Law prescribed a management model that–reflecting some other European examples–would essentially separate the academic and economic management of the institutions into two independent units that cooperate with each other. In this scenario, the Institutional Council in charge of economic management would have been the body accountable for prudent institutional financial management and in charge of strategic targets–all the while cooperating with academic management. In this system, the president's supreme power within the institution would have been curtailed, as he/she would have become the mere executor of the decisions of the Institutional Council, a radical shift in competences.

Not surprisingly, this was the one measure that ran into the strongest opposition from the institutions and even led to an uproar, so much so that in the end they managed to block this structural change. While this proposal of the Education Cabinet did reach the legislature, and in fact the bill was passed by Parliament with the new structure included, nevertheless the Constitutional Court[7] struck this passage from the law based on an argument that institutional autonomy needed to be protected. The case was brought by the President of Hungary based on an argument founded on the fact, which was later upheld by the court in its decision, that Section 70/A of the Hungarian Constitution prescribes the freedom of sciences. The decision also included references to previous practices of the Court, and to the opinion that this freedom cannot be

[7] Constitutional Court Decision No. 41/2005. (X. 27.).

exercised without the right to have a say in the operational matters of the institution.

The consequence of the Constitutional Court Decision was that the law had to be amended in order to fill the gap left by the struck passages. Since the governing bodies proposed by the concept, which would have been the executive bodies that would have exercised the right of economic management (derived from the rights assigned to the maintainers) could not be set up, these rights are exercised on the one hand by the Senate, as the highest level executive body of an institution of higher education, and on the other hand by the maintainer. Additionally, the so-called economic council was created, which is charged with the task of preparing materials in advance of decision making, and the right to formulate an opinion on economic decisions made in the institution.

It was also based on the Constitutional Court decision that the rights of the maintainer were revised: the maintainer is charged with the oversight of the lawful operation of the institution, but has no direct ability to intervene in operational matters, rather if the maintainer's repeated requests to correct some perceived operational malfunction is not fulfilled and the problem is not remedied, then the maintainer can initiate court proceedings in order for the court to declare the violation of the law. According to the new regulation, the maintainer sets the figure allocated to the institution as its financing, but the maintainer's approval of the specific budget (line items) is no longer required.

This series of measures running their course over a five-year period eventually led to an outcome where institutions of higher education have increased financial independence and economic autonomy. This economic autonomy is the true basis for professional autonomy, because realistically no professional decision-making power can be properly exercised without the appropriate economic decision-making rights.

There were several additional issues regulated by the law, such as:

- The diplomas and other certificates issued within the education system had to have a system of comparing them.
- A new aspect of the law is that it gives specific guarantees in relation to the legal relationship between the student and the institution, including the way they enter into this relationship, maintain it, suspend it, or dissolve it.
- It is in connection with the legal relationship between student and institution that the law regulates the differentiated higher education admission system, with the declared goal that those students performing at the highest level nationally within the secondary school system (built around a uniform requirement set) get those enrollment positions in higher education that are state financed. (This is true with all cycles of the

system: basic level, masters level, doctoral training, as well as specialization training, and accredited higher vocational training.
- The equal opportunity requirement is introduced as a new requirement adopted from European practice, including the representation of women in appropriate numbers, support of disadvantaged students, and the legal regulation mandating the creation of environments friendly to physically disadvantaged people.
- The law creates a uniform institutional practice by way of a consistent attitude toward all relevant regulation of those services that guarantee student's living and working conditions being appropriate in terms of studies, career, sporting, extracurricular activities, healthy lifestyles.
- Naturally, all this[8] is done in the law in accordance with the relevant directives of the European Union.

As of 2006, the education cabinet is finally in a state where it can essentially focus on the execution of the law. The Government has also issued a set of

[8] Just to name only the more important ones:

– The law prescribes the ban of negative discrimination in order to execute the directives contained in 2000/43/EC, which defines the standard of equal treatment of all persons regardless of their race or ethnicity.

– The European Communities Council Directive No. 93/96/ECC sets the rules of students residency rights, which is the basis for the law's regulation related to entering into the legal relationship between student and host institution

– The European Communities Council Directive No. 1612/68/ECC sets the rules for the free movement of workers within the Community, which is the basis for the law's regulation related to employment issues.

– The European Communities Council Directive No. 1999/70/EC based on a framework-agreement by ETUC, UNIC, UNICE and CEEP related to definite-term employment is the basis in the law for regulation related to employment status, and entering into a public employee status.

– The Council has a proposal dated September 24, 1998. on pan-European cooperation on the quality-assurance of European higher education, which is the basis for the law's regulation related to the functioning of Hungarian Accreditation Committee (MAB), and the accreditation procedure.

– The European Parliament and the Council's Directive No. 2001/19/EC on the general system for the recognition of professional qualifications amends Council Directives 89/48/EC and 92/51/EC, in addition to directives on general nurses, dentists, veterinarians, midwives, architects, pharmacists, and medical doctors 77/452/ECC, 77/453/ ECC, 78/686/ EEC, 78/687/ EEC, 78/1026/ EEC, 78/1027/ EEC, 80/154/ EEC, 80/155/ EEC, 85/384/ EEC, 85/432/ EEC, 85/433/ EEC and 93/16/ EEC.

The execution of the directives listed above is guaranteed by the law via its regulation of the structure of the education, and the regulation of the requirements of attaining various degrees and special certificates, and those of entering higher education.

decrees necessary for the proper execution of the law. The novelty (from a legal perspective) here was that several solutions that were necessary for the execution of the new Higher Education Act were combined in a single directive.

Government Decree No. 79/2006 (IV.5) gives rules on the execution of new legal institutions created by the Higher Education Act. One of these was the setting of minimum requirements that are to be met when a new institution of higher education is chartered, as well as setting procedural rules for chartering a school. This primarily fills the role of providing a guarantee that the appropriate staff and infrastructure is available for the school to properly work even if the prescribed maximum permissible enrollment capacity is fully utilized. As far as faculty is concerned, the Decree creates an environment that allows professors not to have multiple public servant employment relations at several different institutions of higher education. The way to keep track of this is via a so-called 'instructor code', which–according to the Decree–had to be created for all faculty members by the end of December 2006, and it had to also be issued to them by this date. The reason behind this measure was that in the past decade accreditation trends caused leading professors to have several employment contracts. The multiple employment situation actually benefited no one involved: students could only establish a rather more limited personal relationship with their 'wandering-teachers'; it was a burden for the institutions as well, because they were essentially issuing paychecks to „Dead Souls" (as in the title of Nikolai Gogol's epic poem), who could not take their fair share of the load of teaching and (other faculty) work; and in fact this was cumbersome and unpleasant for the professors as well, who could not make close ties with any given institution while at the same time being overloaded with work.

The Decree also gives detailed regulation of the so-called 'higher level specialty training'. This institution, which is not very good in its naming or otherwise, took root in the Hungarian legal system in 1997 (when it was named 'accredited schooling system higher level specialty training course'), which could be conducted both by secondary schools and institutions of higher education. Students are not issued any diploma at completion time, but it provides students with specialty certification, and knowledge acquired during the course(s) are convertible to transferable credit in case the student goes on to study in another higher education program. In fact, the true practical advantage was that at the time the credit system was launched it was important to demonstrate the utility of credit transferred from outside, and also this gave an additional chance for getting a diploma for those young adults who would have previously be destined to merely getting professional specialty certification. In practice, this level of training is overwhelmingly conducted by

secondary schools based on agreements they enter into with institutions of higher education. (In its current function, it has become a hidden form of inflating enrollment figures at colleges and universities.)

Rules on the higher education information system prescribe that the institution in charge is the Higher Education Information Center, which keeps record of data on higher education development (and financing) received from the institutions. Since in Hungary the Privacy Act (Law on the Protection of Private Information and the Freedom of Information of a Public Nature) says that legitimate data transfer can only occur based on specific mandate given by law, therefore the scope of the data to be provided by the institutions is defined in an appendix of the Higher Education Act, but the method of data transfer is described in the Government Decree. (The student and faculty identification numbers are also tracking aids created for the express purpose of making people identifiable by the data management system.)

This decree also contains the rights of students with learning difficulties or physically disadvantaged persons, and special regulations connected to modified examination methods for them, or possible waivers related to exempting them from meeting requirements otherwise prescribed by law (e.g. exemption from under the relevant part of a foreign language test for students suffering from dyslexia, or hearing or vision impairment.)

Rules on implementing the credit-based system are also found in this decree (such as the principal rules of the institutional credit system, rules of related record keeping, etc.). Additionally, the body called Credit Council and Bureau established in 1997 was carried over into the revised system, an institution identified as the premier organization charged with the continuous development of the credit system, and is also identified as the information center in international credit matters.

There were some additional new rules created that intend to improve the overall situation of students. One of the most important measures was the raising of the student loan ceiling (larger sum), as well as the widening of the scope of eligible individuals (expense-compensation based students, doctoral students, students opting to attend an institution of higher education in another European Union member state). While this is not a perfect solution, as it does not–especially in the case of those studying abroad–cover living expenses, nevertheless, it undoubtedly eases the financial burden of students' families, therefore they can participate in higher education independently of their financial background.

Based on all of the above, the transitioning process has a fair chance of succeeding.

Today, we expect to see a trend take shape in the forthcoming years, where the implementation of the reform will lead to more instances of state participation in order to weed out overpopulated but dysfunctional programs that produce graduates that join unemployment lines in droves on the day of their graduation. It has become clear by now, that neglecting needed development projects was harmful, and this problem is not effectively offset by the otherwise positive development that grants the right for institutions to generate income of their own, a right previously barred. *While the state is no longer paternalistic in its attitude toward higher education, it still maintains tight controls.*

The question remains unanswered whether central budget cuts have caused the system to operate more efficiently, and rationally. It is unclear also if increased enrollment, more courses, quantitatively more expectations of students and academics alike can be understood as higher achievement on the part of the system. At the moment the answer is probably no, or at least the issue is ambiguous. The one positive aspect is that students graduating from now on will face an achievement oriented workplace environment, and they become aware of that in time, and they understand that they themselves are responsible for being prepared to face this unforgiving professional environment. They understand that they need to make sacrifices, and are willing to invest (in their own "human resource capital"), and then they will be able to succeed, although perhaps differently from how it was once imagined. In some sense this is also true for the institutions of higher education as well: they are not spoiled brats, therefore they are forced to find a way to survive.

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TAMÁS NÓTÁRI*

The Spear as the Symbol of Property and Power in Ancient Rome

Abstract. In his well-known description of *legis actio sacramento in rem*, Gaius remarks that the rod was used in the procedure instead of the spear as the sign of lawful property since what the Romans considered truly their own was the goods taken from the enemy: *"Festuca autem utebantur quasi hastae loco, signo quodam iusti dominii; quod maxime sua esse credebant quae ex hostibus cepissent."* In harmony with Gaius's view Verrius Festus states that the spear is the symbol, incarnation of supreme power: *"Hasta summa armorum et imperii est."* Setting out from these two *testimonia*, in the present study we intend to examine the content of the *hasta* and the *festuca* as symbols of power to support the interpretation of the ritual of *legis actio sacramento in rem* as *duellum sacrum*. First, we shall give a brief account of the occurrences of the spear as the symbol of *imperium*, of *subhastatio* related thereto and the function of the supreme commander's spear; also, we shall touch on the stick of *augures* and certain Greek prefigurations and parallels of the symbolic nature of the spear and the rod. (I.) After that, we shall make some statements concerning the spear of the god Mars and the Mars cult, and the relation of Quirinus and Quirites to the symbolism of the spear. (II.) The *fasces* carried by *lictores* proceeding in front of the *magistratus*, the *flamen Dialis* and the *virgo Vestalis* are also insignia of power and, as we try to highlight this point, incarnate the highly sacralised, numinous nature of power. (III.) Finally, from the ceremony of declaring war and from the special character and use of the spear in the ceremony we intend to show certain parallels between *ius fetiale* and *legis actio sacramento in rem*. (IV.)

Keywords: legal symbols, spear, hasta, festuca, legis actio in rem

I. It can be rightly assumed that in the beginning–and probably later on as well–the spear as weapon was nothing else than a long, sharp rod made of hard wood, and hardened in fire.[1] If the *hasta* was the weapon with which in the course of the fights they could win loot, recognition, and hence power, it is no

* Associate Professor, Reformed University "Károli Gáspár", Faculty of Legal and Political Sciences, Department of Roman Law, H-1042 Budapest, Viola u. 2–4.
E-mail: tamasnotari@yahoo.de

[1] Cicero: *In Verrem* 4, 125; Plinius maior, *Naturalis historia* 16, 65; Herodotus 7, 71; Tacitus: *Annales* 2, 14; Propertius 4, 1, 28; Ammianus Marcellinus 31, 7, 12.

wonder that shortly it became the symbol of power.[2] This is also shown by Verrius Festus's definition: *"hasta summa armorum et imperii est"*,[3] and the reference to *imperium*, especially in connection with the spear, reminds one of its magico-religious character, belonging to the sacred sphere.[4] *Imperium* denotes the actual power of the commander in the first place; however, it is also related to the sphere of religion; in *auspicium* the sacred element predominates; at the same time, it implies the entitlement to implement it.[5] Wagenvoort observes that in Roman thinking certain persons possessed exceptional *mana* of their own; so, for example, the *imperator*, when we examine the origin of the word, had creating, fertilising force,[6] and when as a commander he gave his soldiers an order to occupy the enemy's camp, then with his magic word he conjured up in them the force necessary for executing the order; this implies that *imperium* is nothing else but a form of transmitting mystical force.[7] The military and religious leader (initially both duties were fulfilled by the *rex* among the Romans)[8] possessed *mana*, that is what made him able, e.g., to increase the fertility of the earth as ethnological examples show. Accordingly, in Wagenvoort's interpretation *imperare* originally meant nothing else but *to conjure up, to fertilize* since the commander, who gave order to his soldiers to attack a foreign camp (*imperabat*), with his magical word created, conjured up the force necessary for executing the order; that is, the author draws the conclusion, *imperium* is actually the ability to transmit, create mystical force.[9] Köves-Zulauf points out as a specificity of this that: *"the particular*

[2] Waele, F. J. M. de: *The Magic Staff or Rod in Graeco-Italian Antiquity*. Gent, 1927. 172.

[3] Festus 55, 3.

[4] See Pötscher, W.: 'Numen' und 'numen Augusti'. In: Pötscher, W.: *Hellas und Rom*. Hildesheim, 1988. 462; Wagenvoort, H.: Wesenszüge altrömischer Religion. In: *Aufstieg und Niedergang der römischen Welt*. Berlin–New York, 1972. I. 2. 371 sq.; Nótári, T.: On Some Aspects of the Roman Concept of Authority. *Acta Juridica Hungarica* 46. 2005. 95 sqq.

[5] Pötscher, W.: *'Numen' und 'numen Augusti'*. In: Hellas und Rom. Hildesheim, 1988. 462.

[6] Walde, A.–Hofmann, J. B.: *Lateinisches etymologisches Wörterbuch I–II*. Heidelberg, 1938. I. 683.

[7] Wagenvoort: *Wesenszüge... op. cit.* 371.

[8] Hamza G.–Földi A.: *A római jog története és institúciói* (History and Institutes of Roman Law). Budapest, 2006[11]. 18.

[9] Wagenvoort: *Wesenszüge... op. cit.* 371 sq. *Sehen wir richtig, so bedeutete das Zeitwort imperare ('befehlen', 'herrschen') ursprünglich 'zum Leben erwecken', 'befruchten'; der Feldherr, der seinen Soldaten befahl (imperabat), ein feindliches Lager zu berennen,*

interest of the issue ... is that parere (to give birth) is a typically feminine word, whereas imperium was exclusively possessed by men".[10]

It is not by chance that the loot taken from the enemy, as Gaius, not at all accidentally, also refers to it,[11] especially selling prisoners of war,[12] and later auctions in general[13] are denoted by the term *subhastatio.*[14] The Romans themselves were aware of the origin of this custom;[15] it often appears within the context of the terms *praeda*[16] and *spolia*; the *hasta* became the symbol of selling,[17] the compound *ius hastae* developed from it,[18] and in state sales sometimes the phrase *hastam ponere* was used,[19] on several occasions the *hasta* as a symbol substituted the entire legal transaction.[20] In this function the spear is called *hasta publica* by Cornelius Nepos,[21] *domina hasta* by Iuvenalis,[22] the place of the *hasta* is called *hastarium* by Tertullianus,[23] and the custom of displaying the *hasta* survived[24] during the entire period of the Roman empire.[25]

When presenting the institution of *decemvri stlitibus iudicandis*, Pomponius uses the term *hastae praeesse*[26] which could not mean anything else but the leading of *iudicium centumvirale*. However, *iudicium centumvirale* came into

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erzeugte in ihnen durch sein magisches Wort die Kraft zur Erfüllung seines Auftrages. Imperium ist also eine Form der Übertragung geheimnisvoller Kraft.

[10] Köves-Zulauf, Th.: *Bevezetés a római vallás és monda történetébe* (Introduction into the History of Roman Religion and Myth). Budapest, 1995. 31.

[11] Gaius, *Institutiones* 4, 16. *quod maxime sua esse credebant quae ex hostibus cepissent.*

[12] Festus 55, 9; 90, 19.

[13] Codex Iustinianus 10, 3, 1 sqq.

[14] Livius 2, 14, 1–4; Dionysius Halicarnassensis 5, 34, 4; Valerius Maximus 3, 2, 2; Cicero: *De officiis* 2, 27. 83; *Philippicae* 2, 64. 103; Varro, *De re rustica* 2, 10, 4; Codex Iustinianus 4, 44, 16. Cf. Alföldi, A.: Hasta – Summa Imperii, The Spear as Embodiment of Sovereignty in Rome. *American Journal of Archeology* 63. 1959. 3. 8; Kovács P.: Adatok a hasta mint hatalmi jelvény használatához. *Antik Tanulmányok* 47. 2003. 261 sqq.; 268; de Waele: *op. cit.* 172.

[15] Livius 2, 14. 1 sqq.; Dionysius Halicarnassensis 5, 34, 4.

[16] Cicero: *De officiis* 2, 27, 8; Livius 4, 29, 4; Suetonius, *Divus Iulius* 50, 2.

[17] Cicero: *Philippicae* 2, 103.

[18] Tacitus: *Annales* 13, 28; Codex Iustinianus 10, 3.

[19] Cicero: *De officiis* 2, 29. 83; *Philippicae* 2, 64; *De lege agraria* 2, 53.

[20] Codex Iustinianus 10, 3, 1. Cf. Kovács: *op. cit.* 269.

[21] Cornelius Nepos, *Atticus* 6, 3.

[22] Iuvenalis 3, 33.

[23] Tertullianus: *Apologeticum* 13; *Ad nationes* 1, 10.

[24] Codex Theodosianus 10, 17; Codex Iustinianus 10, 3.

[25] Kovács: *op. cit.* 269.

[26] Pomponius, Digesta 1, 2, 2, 29.

being only one hundred years after the date assumed by Pomponius (242–227 BC.),[27] thus the historical credibility of Pomponius's report becomes doubtful, it can be safely stated that only a *magistratus cum imperio* was entitled to decide the question of *legitimum dominium*.[28] The insignia of *iudicium centumvirale*,[29] founded in the 2nd century BC. was the so-called *hasta centumviralis*. By the end of the republic the presidency of this court of law was fulfilled by a *praetor* as supervisor at the head of the *iudicium centumvirale*.[30] Novellius Torquatus Atticus was the first *praetor hastarius* or *praetor ad hastam* known by name. With this disposition, Augustus probably did not introduce a new *proquestor*, due to the engagement of *praetors*.[31] Augustus appointed again a rule but revived an older one.[32] If the court was sitting in different parts, the man, chosen by the *praetor hastarius* from among the *decemvirii* to preside the court *ad hoc*, was using his own spear in the *iudicium*,[33] which fact is corroborated by Quintilian's report of *duae hastae* in the case when the *iudicium centumvirale* was functioning divided into two parts.[34] The *iudicium centumvirale*, judging cases of inheritance under the supervision of the *praetor hastarius* was usually sitting in four sections in the *basilica Iulia*.[35]

The *hasta pura*, *pura* because it was made of metal, and *donatica (dory katharon)* were regarded as military decorations[36] as Servius's comments on the *Aeneis* reveals,[37] and the spear awarded for military courage must have been an *imperator*'s spear or a copy thereof to express that the person the decoration was awarded to would deserve to fulfil a military leader's office.[38] In addition to the eagle and some other sacred animals, the most widespread badge in the Roman army was the spear itself, whose tip was in many cases decorated with various *dona militaria*, which can be seen in works of fine art.[39] The *hasta* indicated commander's power, and its practical significance cannot be undervalued either since it was used to give the army the necessary signals

[27] Mommsen, Th. *Römisches Staatsrecht I–III.* Berlin, 1887–1888. I. 275.
[28] Alföldi: *op. cit.* 9.
[29] Cf. Mommsen: *Römisches Staatsrecht. op. cit.* II. 225.
[30] Mommsen: *Römisches Staatsrecht. op. cit.* II. 225; Alföldi: *op. cit.* 9.
[31] Suetonius, *Augustus* 36, 1; Statius 4, 4, 41.
[32] Corpus Inscriptionum Latinarum, 6, 1365, 13; 8, 22721, 5; ILS 950; Mon. Ancyr. 8, 5.
[33] Alföldi: *op. cit.* 10.
[34] Quintilianus, *Institutio oratoria* 5, 2, 1; 11, 1, 78.
[35] Plinius minor, *epistulae* 5, 9, 1–2. 5; 6, 33, 2–5; Quintilianus, *Institutio oratoria* 12, 5, 6.
[36] Kovács: *op. cit.* 268 sqq.; 273 sqq.
[37] Servius *in Verg. Aen.* 6, 760.
[38] de Waele: *op. cit.* 173.
[39] Alföldi: *op. cit.* 12.

for moving troops; and the *vexillum* was actually a piece of textile fixed under the tip of the spear.[40] Also *vexillum* was carried by his Guards directly in front of the *imperator* as it can be seen on the column of Traianus and Marcus Aurelius,[41] it was used to call the soldiers to get ready for fight,[42] to give signal to begin a clash[43] both in land and sea battles.[44] (The commander-in-chief's *vexillum* was purple, and the act of Augustus awarding *caeruleum vexillum* to Agrippa[45] seems to be the first step in development of the hierarchy of colours that reached the stage of completeness later in Byzantium.[46]) Furthermore, the spear was the badge of the *manipulus*, which expression is explained by Ovidius as a bundle of hay attached to a long pole;[47] later its use can be justified with sacred reasons rather than practical ones, and these bunches of grass must have been related to the *sagmenta* of the Capitolium.[48] This argumentation seems to be supported by the fact that apart from the eagle (or the horse, the human-headed bull, the wild boar and the wolf before the times of Marius),[49] other badges were honoured with cultic ceremony,[50] and quite often the oath was taken on them.[51]

In representations a stick with a slightly bent tip on the top, the *lituus* can be seen in the hand of the *augur*;[52] the origin of the word *lituus* is somewhat dubious. Walde–Hofmann connects it to the curved shape of the stick,[53] Latte believes Etruscan origin cannot be excluded since it was brought to Rome through the *disciplina Etrusca*.[54] With the *lituus* the *augur* designated the sacred space selected by the gods, cut out from the profane space, i.e., the *templum*[55] as well as the cardinal point, or the part of the firmament from where

[40] Cf. Domaszewski, A. v.: *Die Fahnen im römischen Heere.* Wien, 1885.
[41] Alföldi: *op. cit.* 13.
[42] Caesar, *De bello Gallico* 2, 20, 1; Plutarchus, *Brutus* 40, 5.
[43] Caesar, *De bello civili* 3, 89, 5.
[44] Dio Cassius 49, 9, 1.
[45] Suetonius, *Augustus* 25, 3; Dio Cassius 51, 21, 3.
[46] Alföldi: *op. cit.* 13.
[47] Ovidius, *Fasti* 3, 117; Plutarchus, *Romulus* 8, 7; Servius, *in Verg. Aen.* 11, 463.
[48] Vö. Livius 1, 24, 4 sqq.; Renel, L.: *Cultes militaires de Rome: les enseignes.* Paris, 1903. 238, 248 sqq.
[49] Tacitus, Annales 1, 39, 6.
[50] Tertullianus, *Apologeticum* 16, 8; *Ad nationes* 1, 12, 14.
[51] Servius, *in Verg. Aen.* 8, 1.
[52] Servius, *in Verg. Aen.* 7, 190; Livius 1, 18, 7; Cicero: *De divinatione* 1, 30.
[53] Walde–Hofmann: *op. cit.* I. 815.
[54] Latte, K.: *Römische Religionsgeschichte.* München, 1967. 157 sq.
[55] Varro, *De lingua Latina* 7, 7.

he expected to receive the divine signs to be interpreted by him.[56] (Tradition has it that Romulus and Remus, who attached the right of establishing a town to the result of augury, had already fulfilled *augur*'s duties;[57] another tradition maintains that the establishment of the *collegium* of the *augures* is linked to Numa Pompilius;[58] the Regia was believed to be built around the *lituus Romuli*.[59]) However, we should take into consideration that initially the *augur*'s function was determined primarily not by the task of interpreting divine signs, quite the contrary, as the origin of the word deducible from the *verbum augere* shows,[60] he was given this function just because of the ability of magical augmentation, exceptional *mana* surplus.[61] Again this seems to support the point that the *lituus* must have been the tool of numinous force, the transmission of *mana*.[62] (The term *numen*, especially when investigating earlier sources of Roman literature, is referred to in connection with the gods, the *senatus*, the people of Rome, and in a figurative, philosophical sense with the human mind as a force albeit superhuman in itself yet mostly related to a person; it is entirely in line with these meanings how Rose formulates the definition of this concept: *"Numen signifies a superhuman force, impersonal in itself but regulary belonging to a person (a god of some kind) or occasionally to an exceptionally important body of human beings, as the Roman senate or people."*[63] So *numen*, especially according to the dynamistic trend hallmarked by the name of Wagenvoort, denoted a kind of, to use this Polynesian expression, *mana*, mystical force hidden in a thing, or a person.[64])

Trogus Pompeius reveals, as it is communicated by Iustinus, that in early Roman times kings did not wear a head-dress but carried a spear, this spear corresponded to the Greek *skēptron*,[65] the relevant loci of *De magistratibus* by Ioannes Lydus is in harmony with this source.[66] Giving a brief survey of Greek

[56] de Waele: *op. cit.* 169.

[57] Cicero: *De divinatione* 1, 48. 107; *De re publica* 2, 16; Dionysius Halicarnassensis 2, 22, 3.

[58] Livius 1, 18, 6.

[59] Cicero: *De divinatione* 1, 30; Plutarchus, *Romulus* 22; *Camillus* 32.

[60] Walde–Hofmann: *op. cit.* I. 83.

[61] Wagenvoort: *Wesenszüge... op. cit.* 367.

[62] de Waele: *op. cit.* 171.

[63] Rose, H. J.: Numen and mana. *Harvard Theological Review* 44 (1951) 109.

[64] Köves-Zulauf: *Bevezetés. op. cit.* 29.

[65] Iustinus 43, 3. *Per ea adhuc tempora reges hastas pro diademate habebant, quas Graeci sceptra dixere: nam ab origine rerum pro diis immortalibus veteres hastas ... coluere ob cuius religionis memoriam adhuc deorum simulacris hastae adduntur.*

[66] Iohannes Lydus, *De magistratibus* 1, 8, 37. Cf. Kovács: *op. cit.* 267.

prefigurations, Homer speaks about Agamemnon's *skēptron* first, which was originally made by Hephaistos for Zeus, then it was presented by Zeus to Hermes, by Hermes to Pelops, and by Pelops to Atreus, finally it was bequeathed by Atreus to Thyestes, and by him to Agamemnon.[67] Although several authors have been inclined to see the *skēptron* of the Cretan-Mycenaean age as a kind of remnant of the Egyptian ruler's sceptre, due to the fact that we have no direct evidence of direct impact it cannot be ruled out that in the Greek and pre-Hellenistic culture the sceptre and the rod as symbols of power evolved without any borrowings.[68] The king is the owner of the *skēptron*, he is a *skēptoukhos* par excellence, the *skēptron* is the key symbol of his power,[69] when the king does not use the *skēptron*, he passes it over to his messenger to safeguard it. However, the king can commission the messenger to act in some important matter instead of him, and in this case the messenger may carry the royal *skēptron* to indicate that he proceeds in the king's matter on his behalf; it is only because of the *skēptron* brought along with them that the furious Achilles greets Agamemnon's delegates respectfully,[70] and the messengers of the Trojans and the Achaeans holding their kings' *skēptron* in their hands as the representatives of the ruler's power follow the encounter between Hector and Achilles with attention.[71] (The *skēptron* carried by messengers sent on an errand by their king should not be mixed up with the *rhabdos*, the messengers' customary rod, whose archetype can be seen in Hermes's hands in several descriptions[72] and representations.[73]) As the *hasta* appears as the symbol of supreme power in procedures implemented *sub hasta* for the Romans, likewise the term *hypo skēptrō* one can read in the *Iliad* denotes the reign [74] of Zeus [75] and of the king.[76]

The question arises how the *skēptron*, which in its initial form was probably just a stick, could have become a ruler's symbol, what is more the symbol of the ruler's power. The stick was used by elderly people, who were initially the leaders of the tribe by nature, as a common accessory of their everyday life, and we can assume that this article for personal use of the exercisers of power

[67] *Ilias* 2, 100 sqq.
[68] de Waele: *op. cit.* 109.
[69] *Ilias* 1, 267; 2, 86; *Odysseia* 2, 231; 3, 411; 4, 64; 5, 9; 8, 41 sqq.
[70] *Ilias* 1, 334.
[71] *Ilias* 7, 277 sqq.
[72] *Il.* 24, 343 sqq.; 24, 445; *Odysseia* 5, 47. sqq; 5, 87.
[73] Alföldi: *op. cit.* 16.
[74] *Ilias* 6, 159.
[75] *Ilias* 9, 154 sqq.
[76] Cf. Alföldi: *op. cit.* 17 sqq.

slowly became the symbol, incarnation of the exercise of power.[77] In the judgement scene represented on Achilles's shield the old (the judges pronouncing *dikai*) pass the *skēptron* from hand to hand while making the decision;[78] adjudicating rulers often appear in various descriptions, for example, in the *Iliad*,[79] with *skēptron* in their hands; and the motif of the judge's cane can be found in several classical texts, and in terms of the further development of the symbol it is worth considering that the Byzantine rulers' sceptre was called *dikanikē*.[80] Furthermore, it is expedient to cast a glance at the representation of the three judges of the underworld:[81] Minos, Rhadamanthys and Aiakos. In Homer we have already read about Minos and Rhadamanthys, however, they are not described as the judges of the dead. For Homer the duty of Minos,[82] is simply to calm and stop discord between the shadows; being a just king Minos holds *skēptron khryseon*, a golden sceptre in his hand,[83] the other two judges, and the underworld supervisor have only a rod, *rhabdos* in their hands according to the Athenian tradition conveyed by Plato.[84] Achilles takes an oath on his *skēptron* in the *Iliad*, and then having finished the oath throws it to the ground with all his might.[85] However, we do not know that this latter gesture is merely the result of the fairly heated situation, or a part of taking the oath; the second alternative is supported by Vergilius's adaptation of the scene,[86] in which the motion of striking to the ground is meant to symbolise fate afflicting the oath-breaker,[87] and by the scene of entering into an alliance described by Livy where the juror asks for Iuppiter's punishment in the form of self malediction to be imposed on the person breaking the oath, if it applies, on himself.[88]

II. In Servius's commentary on Vergil's *Aeneid* the description of the following ceremony can be found: *"Is qui belli susceperat curam, sacrarium Martis ingressus primo ancilia commovebat, post hastam simulacri ipsius, dicens:*

[77] de Waele: *op. cit.* 118.
[78] *Ilias* 18, 497 sqq.
[79] *Ilias* 9, 99, 156.
[80] de Waele: *op. cit.* 122.
[81] Plato, *Gorgias* 524a
[82] *Odysseia* 11, 568.
[83] *Odysseia* 11, 568 sqq.; Plato, *Gorgias* 526c
[84] de Waele: *op. cit.* 123.
[85] *Ilias* 1, 233 sqq.
[86] Vergilius: *Aeneis* 12, 206.
[87] Alföldi: *op. cit.* 24.
[88] Livius, 1, 24, 8 sq.

'Mars vigila!'"[89] The picture of the deity could not be too old, because the Romans did not represent the image of their gods in the beginning,[90] and Servius's explanation goes back to Varro, just as Plutarch's similar remark:[91] *"en de tē Rhēgia dory kathidrymenon Area prosagoreyein."*[92] Seemingly, Varro gets into contradiction with the tradition, which has knowledge of several spears in Mars's *sacrarium*. These must have been the spears of the *salii*, which were kept in the *sacrarium Martis*, together with the shields.[93] The plural of shields is not surprising because–as it becomes evident from the Aitologian myth explaining the institution of the *salii*–Numa Pompilius ordered the manufacturing of another eleven copies of the *ancile* descending from the sky, in order to prevent the stealing of the original one. During their processions the *salii* were carrying the *ancile* in their left and were beating it with a spear-like rod.[94] The form of these spears was not identical with the form of those that were generally known and actually used for fighting in the Classical Age but they preserved–just like the shields of the *salii*–their archaic shape: They were so-called *hastae purae*, made exclusively of wood without any iron, and their *prodigium* was shown by their movement without any human agency in the *sacrarium*.[95]

Nevertheless, the spears of the *salii* must be distinguished from Mars's spear, which was–as they were venerating Mars's presence in it[96]–surrounded by a cult that was due to a deity,[97] as the veneration of gods (e.g., Iuppiter, Terminus) in some material form was usual for the Romans, which can be explained by the concept of the unity of person-authority.[98] (The *Person-Bereichdenken*, the *person-authority* way of thinking was a special way of experiencing the world for the man of antiquity, in the course of which he experienced physical reality, objects, processes, or states as such, and, at the same time, he experienced them as divinity as well. The thing and the divinity

[89] Servius, *in Verg. Aen.* 8, 3.

[90] Augustinus, *De civitate Dei* 4, 31; Plutarchus, *Numa* 8; Latte: *op. cit.* 150; Herter, H.: Zum bildlosen Kultus der Alten. *Rheinisches Museum* 74 (1925) 164 sqq.

[91] Norden, E.: *Aus altrömischen Priesterbüchern.* Leipzig, 1939. 173 sqq.

[92] Plutarchus, *Romulus* 29, 1.

[93] Gellius 4, 6, 1–2; Wissowa: *op. cit.* 556.

[94] Plut. *Numa* 13, 7; Dionysius Halicarnassensis 2, 70.

[95] Servius *in Verg. Aen.* 6, 760; Livius 40, 19, 2.

[96] Dumézil, G.: *L'héritage indo-européen à Rome.* Paris, 1949. 60.

[97] Arnobius 6, 11. (coluisse) *pro Marte Romanos hastam, Varronis ut indicant Musae.*

[98] Wissowa: *op. cit.* 1912. 144; Latte: *op. cit.* 114 sqq.; Scholz, U. W.: *Studien zum altitalischen und altrömischen Marskult und Marsmythos.* Heidelberg, 1970. 29; Pötscher: *'Numen'. op. cit.* 457 sq.

is often designated with the same word, and sometimes it is considerably difficult to decide whether in a particular case *themis* or *Themis*, *fortuna* or *Fortuna*, *terminus* or *Terminus* should be written. Naturally, either solution is chosen, the other component is tacitly part of the concept and should be taken into account as well.[99] Designation with the same word seems to suggest juxtaposition but in fact it means the unity of the person and his/her function, the sphere of authority represented by him/her, in which alternatively one or the other aspect comes to the fore.[100]) Iustinius in his *Epitoma Historiarum Pompei Trogi* mentions that, in the beginning, the spear was surrounded by a divine cult.[101] Servius, based on Varro, reports that at the beginning of war, after the moving of the ancilia, the celebrating priest also moved the hasta, as the image of the deity (*simulacrum ipsius*) and in the course of this he awoke Mars with the appeal *"Mars vigila!"* and by this, if we conceive Mars as a *unity of person-authority*, he awoke War itself.[102] There is no need of any further explication to see the manaistic, numinous aspect recognized by Wagenvoort in this religious act.[103] The derivation of Quirinus's name, meaning *"spear"* from the word of Sabin origin *quiris-curis* can be found in several *auctores*,[104] and Iuno's name, Quiritis is also explained this way.[105] It is not by chance that Thormann appositely translates the name *"Quirites"* of the Roman citizens with the expression *"Speermänner"*.[106]

The importance of the ancient triad of *Iuppiter–Mars–Quirinus* was recognised by the founder of the Indo-European school of the history of religion, Dumézil. While researching the Indo-European image of society, Dumézil realised that society is divided into three vertically structured zones which correspond to three functions: reign, force and fertility, and these are related to three social groups (kings, warriors, producers), and three relevant specific

[99] Cf. Pötscher, W.: Ares. *Gymnasium* 66 (1959) 4 sqq.

[100] Pöscher, W.: Das Person-Bereichdenken in der frühgriechischen Periode. *Wiener Studien* 72 (1959) 24.

[101] Iustinus 43, 3, 3. *Nam ab origine rerum pro diis immortalibus veteres hastas coluere.*

[102] Servius *in Verg. Aen.* 8, 3. *Est autem sacrorum: nam is qui belli susceperat curam, sacrarium Martis ingressus primo ancilia commovebat, post hastam simulacri ipsius, dicens "Mars vigila".*

[103] Wagenvoort: *Wesenszüge... op. cit.* 352 sqq.

[104] Ovidius, *Fasti* 2, 475 sqq.; Marcobius, *Saturnalia* 1, 9, 16; Dionysius Halicarnassensis 2, 48, 2–4; Plutarchus, *Romulus* 29, 1.

[105] Festus 43, 5; 55, 6.

[106] Thormann, K. F.: *Der doppelte Ursprung der mancipatio, ein Beitrag zur Erforschung des frührömischen Rechtes unter Mitberücksichtigung des Nexum.* München, 1943. 32, 80 sqq.

deities[107] (e.g., in Rome to Iuppiter, Mars and Quirinus). India worked out this threefold pattern cosmologically, and the Romans historicised the myth as it can be discerned from Book One of Livy's *Ab urbe condita*: Romulus and Numa can be considered the two sides of royal power mutually supplementing each other, the bellicose principle is represented by Tullus Hostilius, while producing and trading fertility boosting every day life by Ancus Martius. (This threefold pattern was replaced during the rule of Etruscan kings, especially the Tarquiniuses by the triad of *Iuppiter–Iuno–Minerva* of the Capitolium,[108] and in this process the temple of Iuppiter Optimus Maximus was placed in the centre of the Capitolium.[109] On the other hand, there is no doubt that initially not only Iuppiter Feretrius had a temple on the Capitolium but as we know it from Varro several other deities, including Mars too.[110])

The cult of the spear related to Mars is associated with a legend told by Plutarch: to try his strength Romulus threw his cornel spear down from the Aventinus, and the spear penetrated the ground so deep that nobody was able to pull it out; then, it took root and grew into a large tree; the Romans surrounded the tree honoured as a sacred being with a wall, which perished only when its roots were hurt while building the *scalae Caci* during the reign of Caligula.[111] This story sheds light on the fact that Romulus's spear was nothing else but the *hasta Martis*, which was venerated with cultic ceremonies because the welfare of the state was believed to depend on its condition and soundness.[112] Analogous with the spear thrown by Romulus is the ritual act of the *pater patratus* throwing the spear to the enemy's territory when declaring war; on the other hand, there is a crucial difference between the two events.[113] (Latte asserts[114] that the act of *fetialis* represents not only the magical commencement of war and attack but the act of taking the enemy's territory into possession too.[115])

[107] G. Dumézil: *Jupiter, Mars Quirinus: essai sur la conception indo-européenne de la société et sur les origines de Rome*. Paris, 1941; *La Religion romaine archaïque*. Paris, 1966.

[108] Cf. Koch, C.: *Der römische Juppiter*. Frankfurt a. M., 1937. 90 sqq.

[109] Livius 1, 55, 1 sq.

[110] Augustinus, *De civitate Dei* 4, 23 sqq.

[111] Plutarchus, *Romulus* 20, 5 sqq.

[112] Scholz: *op. cit.* 31.

[113] Scholz: *op. cit.* 31; A. Carandini: *Die Geburt Roms*. Düsseldorf–Zürich, 2002. 508; Kovács: *op. cit.* 265.

[114] Latte: *op. cit.* 122. *Der Akt scheint nicht allein eine magische Eröffnung des Angriffs, sondern eine Form der Besitzergreifung zu sein.*

[115] Cf. Servius, *in Verg. Aen.* 3, 46; 11, 52.

The following rite constituting a part of the celebrations of marriage can be also associated with *hasta Martis*: before the wedding night the fiancée was not allowed to use her own comb, she had to arrange her hair with what was called *hasta caelibaris* taken out of the body of a killed gladiator.[116] The *hasta caelibaris* was meant to enhance the new wife's fertility, on the one hand; this meaning, however, did not look back on a long past as in Rome gladiator fights were held only from 264 BC.,[117] and it symbolised the wife's subjection, on the other.[118] The explanation concerning Iuno Curitis does not seem convincing either since Iuno specifically as Curitis[119] was the protector of the *urbs* rather than of the female gender.[120] Fertility is, however, enhanced not by being touched with iron but by the contact, unification with the phallic deity of the spear before the conclusion of the marriage; that is, the *hieros gamos* taking place before the wedding, which makes the actual marriage fertile; and the deity of the spear is nodody else than Mars.[121]

The ceremony of using *hasta caelibaris* is intertwined in the tradition with the foundation of the town of Cures. Varro's description reveals that in Enyalios's temple[122] a noble virgin got pregnant, and gave birth to a boy called Modius Fabidius, who having grown up gathered his followers around him and founded a town; he called his followers, either after his spear *(curis)*, or his father Quirinus, Cures.[123] Several elements of Roman-Italian beliefs are merged in this myth. The question of Modius Fabidius's double name can be solved as follows: Fabidius is the forefather of the *gens Fabia* of Sabine origin, commissioned to offer several sacrifices in the Quirinalis,[124] Modius's name is connected with the Latin word *muto*, this is how the birth of the hero is linked through the spear

[116] Paulus Festus 55. *Caelibari hasta caput nubentis comebatur, quae in corpore gladiatoris stetisset abiecti occisique, ut, quemadmodum illa coniuncta fuerit cum corpore gladiatoris, sic ipsa cum viro sit; vel quia matronae Iunonis Curitis in tutela sint, quae ita appellabatur a ferenda hasta, quae lingua Sabinorum curis dicitur;vel quod fortes viros genituras ominetur; vel quod nuptiali iure imperio viri subicitur nubens, quia hasta summa armorum et imperii est.* Cf. Plinius maior, *Naturalis historia* 28, 33, 34.

[117] F. Böhmer: Ahnenkult und Ahnenglaube im alten Rom. *Archiv für Religionswissenschaft* Beiheft 1. 1943. 111 sqq.

[118] Kovács: *op. cit.* 266.

[119] Servius, *in Verg. Aen.* 1, 8.

[120] Latte: *op. cit.* 100, 167 sq.

[121] Scholz: *op. cit.* 162. Cf. Samter, E.: *Geburt, Hochzeit und Tod.* Leipzig–Berlin, 1911; Köves-Zulauf, Th.: *Römische Geburtsriten.* München, 1990.

[122] Ebeling, E.: *Lexicon Homericum I–II.* Hildesheim, 1963. I. 425 sq.

[123] Dionysius Halicarnassensis 2, 48.

[124] Livius 5, 46, 2.

god Quirinus (cf. the Antique *curis>Quirinus* etimology) to phallic symbolism.[125] Although Quirinus was the deity of the hillock of Quirinalis, the Sabine tradition–and of course the Fabiuses and Varro–claimed it belonged to them, and this gives rise to the question whether the word Cures comes from the word spear *(curis)* or from Quirinus's name. In this case what we have here is unambigously an *interpretatio Sabina*, which tried to oust the (phallic) spear god, Mars; the Mars cult is recalled by the spear, the *hasta caelibaris* here called *curis*, the connotation of Modius's name and the pattern of the myth of the foundation, which is identical with the Romulus cycle and the rite of the *equus Octobris* as far as its basic features are concerned.[126]

Hence it becomes clear that Roman thinking connected somehow the concept of the force inherent in the spear, the *numen* both with Mars and with Quirinus, but the exact definition of this connection is encumbered by the fact that the existing sources expound on this numinous force only in the case of *hasta Martis*.[127] The question arises why they were using a rod, the *festuca* instead of the spear meaning *iustum dominium,* in the course of the symbolic fight of *legis actio sacramento in rem.* According to Herman van der Brink the *festuca* and the *hasta* are parts of two completely different symbolic systems.[128] He considers the spear to be an Indo-European symbol of power,[129] whereas he regards the rod as part of the Mediterranean culture.[130] At the same time, he disregards the point that at the time when these symbols were formed, the differences between the spear and the rod most probably had not occurred yet, as both were made of wood; the only minor differences could be the size or that the rod used as a weapon was hardened in fire.[131] The fact that in the ceremony of the *vindicatio* the *festuca* stood for; i.e., represented the *hasta* can be explained by the disposition which from the beginning attempted to restrict the use of the spear within the *pomerium* and to confine it to the sphere of the most necessary rites.[132]

[125] Marbach, E.: *Modius Fabius*. RE 15. 1932. 2328 sqq.
[126] Scholz: *op. cit.* 163.
[127] Alföldi: *op. cit.* 19.
[128] Brink, H. van den: Staff laying. In: *The Charm of Legal History.* Amsterdam, 1974. 68.
[129] Cf. Neufeld, E.: *The Hittite Laws*. London, 1951.
[130] Brink: *op. cit.* 70 sqq., 77.
[131] Waele: *op. cit.* 172.
[132] Alföldi: *op. cit.* 4.

III. The relation between the *magistratus* and the *lictores* following him was formulated quite to the point by Gladigow, namely that the duty of the *lictores* was to manifest the *magistratus*, and this applies both to the external appearance of the *magistratura* and the functional cooperation between the *magistratus* and the *lictores*.[133] As far as the external manifestation is concerned this means that the *magistratus* and the *lictor* wear the same clothes, *toga* in Rome, scarlet *paludamentum* outside Rome and during the *triumphus*,[134] and mourning toga in mourning.[135] In accordance with the Roman representation principle in place between the *magistratus* and the *lictores* the person bearing the given dignity is stressed not by the pomp and adornment of his entourage but by increasing the number of the entourage wearing the same clothes as he wears.[136] Yet the similarity of the appearance is not the only sign of this close belonging together, the *magistratus* and the *lictores* go together everywhere[137]–accordingly, the *magistratus* must go even to the brothel with an official entourage, albeit by doing so he impairs his official dignity[138]–and the *magistratus* may appear without his *lictores* solely when he wants to show his intention to resign from the office of the *magistratura*.[139] (Only at his home was the *magistratus* not directly accompanied by the *lictores*, who waited in the *vestibulum* of his house.[140]) Being the carrier of *imperium* and by that of *mana*, each appearance of the Roman *magistratus* was an official, consequently, a sacred event. Through the *lictores* showing an image externally identical with him the *mana* carried by him appeared in a multiplied form.[141] The *lictores* walked before the *magistratus* in a single file,[142] between the last *lictor*, the *lictor proximus*[143] and the *magistratus* nobody was allowed to enter except for the *magistratus*'s

[133] Gladigow, B.: Die sakralen Funktionen der Liktoren. Zum Problem von institutioneller Macht und sakraler Präsentation. In: *Aufstieg und Niedergang der römischen Welt* I. 2. 1972. 295.

[134] Varro, *De lingua Latina* 7, 37; Livius, 41, 10, 5; Cicero: *In Pisonem* 55; Silius Italicus 9, 419.

[135] Horatius, *Epistulae* 1, 7, 5.

[136] Gladigow: *op.cit.* 296.

[137] Livius, 17, 1; 23, 23, 1; 17, 17, 8; Cicero: *Pro Cluentio* 147; *De bello Alexandrino* 52, 3; Silius Italicus 9, 419; Plinius maior, *Naturalis historia* 7, 30, 112; Iuvenalis 3, 128; Valerius Maximus 1, 1, 9.

[138] Seneca maior, *Controversiae* 9, 2, 17.

[139] Livius 23, 23, 1 sqq.

[140] Livius 39, 12, 2.

[141] Gladigow: *op. cit.* 297.

[142] Livius 24, 44, 9 sqq.

[143] Cicero: *De divinatione* 1, 59; In Verrem 5, 142; Valerius Maximus 2, 2, 4; *De bello Alexandrino* 52, 3; Sallustius, *De bello Iugurthino* 12, 3; Tacitus, *Historiae* 3, 80, 11.

underage sons.[144] These provisions cannot be explained by security reasons since the *lictores* did not constitute the guards of the *magistratus*, all the more as the *lictores* proceeding in front of the *magistratus* provided no protection against possible attacks threatening him from the side or from behind his back; the reason for the prohibition must be looked for in the sphere of the sacred because the existence of a person entering between the *lictor proximus* and the *magistratus* would have disturbed the sphere of the *mana* present around the *magistratus* and of the *imperium* carried by him.[145]

It makes it much easier to understand the function of the *lictores* that not only the *magistratus* but also the *flamines* and the *virgines Vestales*[146] were entitled to be followed by *lictores*. Directly in front of the *flamen Dialis* a *lictor* was walking,[147] from a somewhat greater distance he was followed by the *praeciae*,[148] who warned people to stop working when the *flamen Dialis* was nearing since the *flamen Dialis* was not supposed to see any activity belonging to the world of everyday life as being Iuppiter's earthly representative[149] he had to live each day of his life as a consecrated holiday.[150] (This purpose was served by the *commoetaculum* held in the *flamen*'s hand with which the Iuppiter priest pushed away things and persons considered impure from himself.[151] It is rather disputed whether one or two *lictores* proceeded in front of the *flamen Dialis*.[152]) The Vestal virgin leaving the *aedes Vestae* was preceded by a *lictor* too,[153] and the *lictores* of the *magistratus* meeting the *virgo Vestalis* let down the *fasces* before the *lictores* of the *virgo Vestalis* as it were to show the respect for the priestess she was expected to receive.[154] It cannot be considered a matter of accident that just the two players of Roman religious life heavily surrounded with taboos in their conduct of life, the *virgines Vestales* and the *flamen Dialis*, whom the life and welfare of the people and the state of Rome depended on in

[144] Valerius Maximus 2, 2, 4.

[145] Gladigow: *op. cit.* 298.

[146] Cf. Latte: *op. cit.* 109 sqq.; Wissowa: op. cit. 253 sqq.; Hommel, H.: Vesta und die frührömische Religion. In: *Aufstieg und Niedergang der römischen Welt* I. 2. 1972. 397 sqq.; Brelich, A.: *Vesta*. Zürich–Stuttgart, 1949.

[147] Plutarchus, *Quaestiones Romanae* 291b; Festus 82.

[148] Festus 293.

[149] Pötscher, W.: Flamen Dialis. In: *Hellas und Rom*. Hildesheim, 1988. 431.

[150] Kerényi, K.: *Die Religion der Griechen und Römer*. Darmstadt, 1963. 198.

[151] Festus 56. *Commoetacula virgae quas flamines portant pergentes ad sacrificium, ut a se homines amoveant.*

[152] Cf. Mommsen: *Römisches Staatsrecht. op. cit.* I. 373 sq.

[153] Plutarchus, *Numa* 10; Dio Cassius 47, 19, 4.

[154] Seneca maior, *Controversiae* 1, 2, 3.

terms of the sacred, were granted with *lictores*' entourage; furthermore, from this fact certain conclusions regarding the sacred and legal status of the *magistratus* vested with *imperium* can be drawn. In the archaic age neither political power could do without the sacred component, nor the religious functions could be left untouched by political aspects; the elements of sacred kingdom of Etruscan origin, including the *fasces*, the *lictores*, constituting components organically tied to each other, cannot be separated in the event of the *triumphus*.[155]

While fulfilling his duties the *lictor*[156] was obliged to carry the *fasces*, he was not allowed to act in his official capacity without them, just as the *magistratus* was not supposed to appear without the *lictores*,[157] and this unambiguously shows the special significance of the *fasces* even in themselves. In the interim period after the right of the *auspicium* and the *imperium* had reverted to the *senatus*, and before the *interrex* was elected, the *fasces* were safeguarded at Libitina's temple. The loss of the *fasces* in fights with the enemy was deemed rather humiliating.[158] For the *magistratus*, or the cases of the *magistratus* possessing *imperium* not subject to the force of *provocatio ad populum*, the bundle of *fasces* consisting of birch-wood or elm-wood[159] embraced a hatchet,[160] which was also considered a symbol with sacred meaning.[161] The *lictores* held the *fasces* in their left hand and carried them on their left shoulder, the gesture of *attollere* was customary on the occasion of taking over the *imperium*, and the *summittere* indicated the act of showing respect for the *magistratus*, the *flamen Dialis* and the *virgines Vestales*; mourning was symbolised by *fasces* turned downwards.[162] The fall or rise of the *magistratus* was indicated by the *fasces*, when he was removed from office the *fasces* were broken,[163] and when

[155] Gladigow: *op. cit.* 301.

[156] Cf. Latte: *op. cit.* 408 sqq.

[157] Vogel, K.–H.: Imperium und Fasces. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 67 (1950) 96.

[158] Gladigow: *op. cit.* 306; Kübler: *Lictor*. RE XIII. 1. 1926. 511.

[159] About the *provocatio* see Bleicken, J.: Ursprung und Bedeutung der Provocation. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 76 (1959) 324 sqq.; Martin, J.: Die Provokation in der klassischen und späten Republik. *Hermes* 98 (1970) 72 sqq.; Lintott, A. W.: Provocatio. From the Struggle of the Orders to the Principate. In: *Aufstieg und Niedergang der römischen Welt* I. 2. 226 sqq.

[160] Iohannes Lydus, *De magistratibus* 1, 32.

[161] Nielsson, M. P.: *Geschichte der griechischen Religion I–II.* München, 1968. 275 sqq.

[162] Tacitus, *Annales* 3, 2; Vergilius: *Aeneis* 11, 93.

[163] Kübler: *op. cit.* 511.

the *magistratus* was elected *imperator* they were decorated with laurel.[164] Pursuant to ancient penal law the hatchet was used as the tool of *securi percussio*, beheading with an axe. The execution was performed in the presence of the *magistratus* by the *lictores* themselves.[165] The details of the implementation of *securi percussio* are mostly identical with the rite of killing a sacrificial animal, and from this fact Mommsen drew the conlusion that in archaic times this form of execution represented an act of sacrificing the perpetrator for the higher powers injurred by the crime and to be appeased by the sacrifice.[166] However, in view of the fact that later on the *carnifex*es replacing the *lictores* in Roman executions suffered certain disadvantages arising from their very activity–since they were seen besmeared with blood, which was considered taboo; for example, they were not allowed to have a ritual burial, to live within the city of Rome[167]–the execution carried out by the *lictores* must have been adjudged basically differently because the *lictores*, albeit they shed blood, did not become taboo-breakers, outcasts of the community. So if we consider the death sentence performed by the *lictores* a sacrifice, then they had to carry it out on a place covered with sacred protection which defended them against harms arising from the blood shed according to Roman beliefs; furthermore, it cannot be ruled out–since the Twelve Table Law prescribed *expiatio* also in the case of involuntary homicide[168]–that there might have been a kind of purifying sacrifice, which washed the besmearing blood off their body in a figurative sense.[169]

In *fasces* the *virgae* were used most often as the tools of *coercitio* during *verberatio*, which was limited in the *leges Porciae*; the *verberatio* applied as *coercitio* must be separated from the corporeal punishment that preceded the implementation of the death *sentence*, and which was forced to an increasingly narrow field through *provocatio*.[170] In the times when death sentences were

[164] Cf. Hilberg, I.: Die fasces laureati der antretenden Konsuln. *Wiener Studien* 25 (1903) 329 sqq.

[165] Mommsen, Th.: *Römisches Strafrecht.* Leipzig, 1899. 911; Földi–Hamza: *op. cit.* 575.

[166] Mommsen: *Römisches Strafrecht. op. cit.* 901, 916.

[167] Plautus, *Pseudolus* 331; Cicero: *Pro Rabirio perduellionis* 5, 15; Festus 56; Servius, *in Verg. Aen.* 12, 603.

[168] *Leges XII tabularum* 8, 24a; Festus 470; Servius, *in Verg. ecl.* 4, 43; *georg.* 3, 387. Cf. Kunkel, W.: *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit.* München, 1962. 38 sqq.

[169] Gladigow: *op. cit.* 309.

[170] Bleicken: *op. cit.* 324 sqq.

implemented by the *lictores*,[171] it was also them who flogged the convict before the execution.[172] Upon the instruction of the *magistratus* the *lictor* unfastened the *fasces*, deprived the convict of his clothes and tied his hands on his back or tied them to a pole. After that on the *"age lege"* order of the *magistratus* the *verberatio* was carried out, then *securi percussio*, beheading with an axe, was performed.[173]

The person ravishing the *virgo Vestalis* was flogged to death by the *pontifex maximus* himself on the *comitium*. We should not ignore the fact that albeit the *magistratus* was present in common executions, he did not actively take part in it.[174] Considering that the *pontifex maximus* (initially the *rex sacrorum*) exercised a kind of *patria potestas* over the *virgo Vestalis*,[175] this act–and the fact that the *pontifex maximus* himself was allowed to execute the death sentence, being *procuratio prodigii* too, on the guilty Vestal priestess[176]–is deemed as a punishment imposed and executed within the range of *iudicium domesticum*[177] since the *pater familias* catching his daughter in the act of adultery were allowed to kill both his daughter and the man committing adultery.[178] On the other hand, *verberatio* in this case was not merely a punishment–since it was not allowed to be executed by the *pontifex maximus* himself–but an expiatory sacrifice, a ritual act too, just like the execution of the Vestal priestess.[179]

Thrashing, flogging, whipping became the most typical form of *castigatio* among the Romans, which unambiguously shows that the ritualistic character is present in this form of punishment in the sacred act of the *pontifex maximus* offering sacrifice by whipping the raper of the *virgo Vestalis* since *castigare*–

[171] Cf. Cicero: *In Verrem* 3, 156; 5, 118, 142; Livius 1, 26; 8, 7, 20; 8, 32, 10; 26, 15, 16; 28, 29, 10; 36, 28, 6; Polybius 11, 30, 2; Mommsen: *Römisches Strafrecht. op. cit.* 915 sqq.

[172] Gaius, *Institutiones* 3, 189; Livius 2, 5, 8; 8, 20, 7; 9, 16, 10; 10, 1, 3; 24, 20, 6. 26, 15, 8.

[173] Livius 28, 29, 11; 26, 13, 15; 26, 15, 9; 26, 16, 3. Gladigow: *op. cit.* 310.

[174] Mommsen: *Römisches Strafrecht. op. cit.* 919.

[175] Wissowa: *op. cit.* 260; Latte: *op. cit.* 110.

[176] Hommel: *op. cit.* 405.

[177] About the *iudicium domesticum* see Földi–Hamza: op. cit. 239; Kaser, M.: Der Inhalt der patria potestas. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 83 (1971) 62 sqq.; Kunkel, W.: Das Konsilium im Hausgericht. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 83 (1966) 243 sqq.; Nótári T.: De iure vitae necisque et exponendi. *Jogtudományi Közlöny* 11 (1998) 421 sqq.

[178] Ulpianus, Digesta 48, 5, 24, 4. Cf. Cantarella, E.: Adulterio, omicidio legittimo e causa d'onore in diritto romano. In: *Studi in onore di G. Scherillo.* Milano, 1972. 244 sqq.

[179] Hommel: *op. cit.* 405.

or the synonyms *corrigere* and *emendare* often read in texts–comprises the gesture of removing filth and sin, restoring the state of *castum* and ritual conciliation,[180] which is confirmed by Paulus using the *verbum castigare* instead of *verberare* when writing about sanctions.[181] (The blood shed in *verberatio* most probably also served the purpose of *expiatio per sanguinem.*[182]) So the *verberatio* carried out by the *lictores* represented a second punishment, although not to make the punishment more severe, since it was part of every execution implemented by the *lictores*, but to constitute an unalienable ritual cleansing element, that is, a sacred second punishment of the death sentence, which was actually the act of sacrificing the offender.[183] The wood of the *virgae* (birch-[184] or elm-wood[185]) also carry a religious connotation since both the birch-wood and the elm-wood were used also by the Greeks (the latter with stronger chathonic implication) in cleansing, in the original sense of the word, cathartic ceremonies;[186] similarly, the act of depriving the convict of his clothes was not only meant to make the punishment more humiliating but to meet the requirement of ritual nakedness often customary in the antiquity. (The emphatically sacred character of the *lictores*' office is supported by two sources describing that *lictores* wore a belt on their clothes,[187] Plutarch asserts that it was used for tying the convict, and Gellius connects it with the *limus* of the *popae*,[188] the assistants of the sacrifice. In none of the representations is there any kind of belt on *lictores*' every day clothes, but the *toga* could be tied with the hanging *lacinia*. This was the so-called *cinctus Gabinus*, which was applied most often in offering sacrifice.[189] Looking into the background of this detail it is justified to assume that *lictores* initially acted on several occasions as assistants of sacrifice, and it is highly probable that in executions considered an act of sacrificing the pepetrator they carried out their task also in a *toga* held together with the belt like *cinctus Gabinus*, which allowed freer movement than the usual form of wearing a *toga.*[190])

[180] Gladigow: *op. cit.* 311.

[181] Paulus, Digesta 47, 18, 2.

[182] Wagenvoort, H.: *Roman Dynamism, Studies in Roman Literature, Culture and Religion.* Leiden. 1956. 147; Gellius 10, 8.

[183] Gladigow: *op. cit.* 311 sq.

[184] Plinius maior, *Naturalis historia* 16, 75.

[185] Plautus, *Asinaria* 575.

[186] Cf. Wagler: *Birke.* RE 3. 1. 1899. 491; Schuster: *Ulme.* RE 9 A 1. 1961. 548.

[187] Plutarchus, *Romulus* 26; Gellius 12, 3, 3.

[188] Latte: *op. cit.* 384.

[189] Mau: *Cinctus Gabinus.* RE 3. 2. 1899. 2558 sq.

[190] Gladigow: *op. cit.* 312 sq.

IV. Comparing *ius fetiale* and *ius privatum* several valuable parallels can be drawn with regard to the structure of *clarigatio*, *rerum repetitio*, and *legis actio sacramento*.[191] The norms with a powerfully religious character of *ius fetiale* show close connection with several other Roman legal institutions; all the more so because for the man of the age it is difficult to imagine a bond with more binding power than the oath, including self malediction as well.[192] (According to Dahlheim, due to its strong superstitious-religious determination *ius fetiale* lacks any kind of moral background.[193] However, his view can be contested because legal formalism and legal ethics are not mutually exclusive components.[194]) In the archaic age, the interstate relationships of Rome were governed by a body of twenty priests, called the *fetiales*.[195] Their tasks included the contracting of alliances, the *foedus*, the establishment of the conditions of armistices, and the declaration of war, given the fact that the war could only qualify as *bellum pium ac iustum* if it was declared and started in accordance with the rules of *ius fetiale*.[196] (It is interesting that for the Romans the basic principle of the invulnerability of the envoys was indisputable. Whereas in the case of the Greeks the division of the institution of the *kēryx*, enjoying sacred protection and the *presbeis*, invulnerable as a result of a political agreement took place very early, in Rome the *fetialis* and later the other envoys–even if they did not belong to the *fetiales*[197]–enjoyed sacred protection, even in time of war.[198])

[191] Donatuti, G.: La "clarigatio" o "rerum repetitio" e l'instituto paralello dell' antica procedura civile romana. *Iura* 6. 1955. 31 sqq.; Volterra, E.: L'instituto della "clarigatio" e l'antica procedura delle "legis actiones". *Scritti Carnelutti*. Padova, 1950. 251 sqq.

[192] Ziegler, K.-H.: Das Völkerrecht der römischen Republik. In: *ANRW* I. 2. 78; Pólay, E.: *Differenzierung der Gesellschaftsnormen im antiken Rom*. Budapest, 1964. 100 sqq.

[193] Dahlheim, W.: *Struktur und Entwicklung des römischen Völkerrechts im dritten und zweiten Jahrhundert v. Chr.* München, 1968. 173.

[194] Ziegler: *op. cit.* 79.

[195] Földi–Hamza: *op. cit.* 65; 167 sqq.; Zlinszky J.: *Állam és jog az ősi Rómában* (State and Law in Ancient Rome). Budapest, 1996. 146 sqq.; Samter: *Fetiales*. RE VII. 2. 2260 sqq.; Wissowa: *op. cit.* 551; Latte: *op. cit.* 121 sqq.; Nótári, T.: Comments on the Origin of the legis actio sacramento in rem. *Acta Juridica Hungarica* 47 (2006) 133 sqq.

[196] Cicero: *De legibus* 2, 21; *De officiis* 1, 36; *De re publica* 2, 31; 3, 35; Varro, *De lingua Latina* 5, 86. Cf. Ziegler: *op. cit.* 100 sqq.

[197] Cf. Marcianus, Digesta 1, 8, 8, 1. *Sanctum autem dictum est a sagminibus: sunt autem sagmina quaedam herba, quas legati populi Romani ferre solent, ne quis eos violaret, sicut legati Graecorum ferunt ea quae vocantur cerycia.*

[198] Livius 38, 42, 7; Pomponius, Digesta 50, 7, 18.

The *foedus*–etymologically related to the expression *fides*[199]–, the Roman state contract implemented by observing the required formalities,[200] as opposed to the *hospitium*,[201] the *amicitia*,[202] the *societas*[203] and the *pax*, does not signify the content of the contract but its form, and its most important element is the ceremonial oath made by the representative of the *populus Romanus*.[204] The ceremony of the *foedus* is presented by Livy. According to him the priest, chosen from among the *fetiales*, who is consecrated *pater patratus* by reciting the texts selected for the occasion and being touched with a bunch of sacred grass *(sagmina)*, takes the oath after reading out the text of the contract.[205] In the oath he calls Iuppiter, the *pater patratus* of the people making contract with him, and the people themselves to witness that the contract that has been read does not contain any falsity, and that the Roman people will not deviate from the former, and if they did–and here follows the self malediction–then he asks Iuppiter to come down on the Roman people the way he is just knocking down the sacrificial pig. Moreover, he should strike even more severely, as he is more powerful than the priest. Then he stabbed the sacrificial animal.[206] Festus recounts a somewhat different formula, according to which the *pater patratus*, after knocking down the pig with a stone, asks Iuppiter to throw him out of his wealth as he is throwing away the stone if he proceeded falsely, but he entreats the god to spare his city.[207] Polybios calls Rome's first contract with Carthago an agreement *per Iovem lapidem*,[208] Cicero ranks the *per Iovem lapidem* oath formula among *ius civile*.[209]

[199] Walde–Hofmann: *op. cit.* I. 494; Latte: *op. cit.* 126 sqq.

[200] Mommsen: *Römisches Staatsrecht. op. cit.* I. 246 sqq.; Neumann, K.: *Foedus.* RE VI. 2. 2818 sqq.; Heuss, A.: Abschluß und Beurkundung des griechischen und römischen Staatsvertrages. *Klio* 27 (1934) 166 sqq.; Frezza, P.: Le forme federative e la struttura dei rapporti internazionali nell'antico diritto romano. *Studia et documenta historiae et iuris* 4 (1938) 363 sqq.

[201] About *hospitium* see Leonhard, P.: *Hospitium.* RE VIII. 2. 2493 sqq.; Frezza: *op. cit.* 397 sqq.

[202] About *amicita* see Heuss, A.: Die völkerrechtlichen Grundlagen der römischen Außenpolitik in republikanischer Zeit. *Klio* Beiheft 31. Leipzig, 1933. 12 sqq.

[203] Cf. Dahlheim: *op. cit.* 163 sqq.; Kienast, D.: Entstehung und Aufbau des römischen Reiches. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* 85 (1968) 334 sqq.

[204] Ziegler: *op. cit.* 90.

[205] Livius 1, 24, 4–7.

[206] Livius 1, 24, 7–9.

[207] Festus 239.

[208] Polybius 3, 25, 6 sqq.

[209] Cicero: *Ad familiares* 7, 12, 2. Cf. Latte: *op. cit.* 122 sq.

When discussing *ius fetiale* it should be pointed out that the Romans were the first to interpret war as a legal fact and they created the concept of *bellum iustum*, influential up to the present day.[210] Not all armed conflicts counted as war, *bellum* could only take place between peoples *(populi)*, only the enemy possessing an organized state counted as *hostis*. In accordance with this, Cicero can state that only the oath given to the enemy obliges, the one given to robbers does not.[211] We can depart from Livy's description in the case of the declaration of war as well. On the border of that people's land from which he demands satisfaction *(rerum repetitio*, or *clarigatio)*[212] the *pater patratus* declares that he presents his demands as an envoy of the Roman people, observing the divine law, and he calls Iuppiter, the borders *(fines)* and the divine law *(fas)* to witness that if he demanded the delivery of the mentioned people or things unrightfully, then Jupiter should not allow him to return to his country. He recites this at the crossing of the border, and with slight alterations to the first person he encounters, and again, when he enters the town, and finally on the main square.[213] If they do not deliver the things asked by him within thirty-three days–Dionysius Halicarnassensis mentions an interval of thirty days[214]–, after calling Iuppiter, Ianus Quirinius, and all the gods witness, he declares that he did not receive what he demanded, and that on returning to Rome, he wishes to deliberate about how they could take revenge. This means that he declares the possibility of war *(testatio*, or *denuntiatio belli)*.[215] Arriving in Rome, the envoy presented the case to the Fathers and if the majority decided for *purum piumque duellum*, the *pater patratus* took an iron tipped or fire-hardened spear *(hastam ferratam aut praeustam sanguineam)* to the enemy's border, and there, making reference to the unrightfulness of the refusal of his demand, he declared war and threw the spear onto the enemy's territory.[216] (Thus the direct *causa* of the war was the enemy people's unlawful behaviour,

[210] Cf. Cicero: *De legibus* 3, 9; Livius 1, 32, 12; Lammert, F.: *Kriegsrecht*. RE Suppl. VI. 1351 sqq.; Ziegler: *op. cit.* 101.

[211] Cicero: *Philippicae* 4, 14; *De officiis* 3, 107 sq.; Ulpianus, Digesta 49, 15, 24.

[212] Plinius maior, *Naturalis historia* 22, 3, 5; Servius, *in Verg. Aen.* 9, 52; 10, 14; Quintilianus, *Institutio oratoria* 7, 3, 13.

[213] Livius 1, 32, 6–8.

[214] Dionysius Halicarnassensis 2, 72, 8.

[215] Livius 1, 32, 9–10. Cf. Ogilvie, R. M.: *A Commentary on Livy*. Oxford, 1965. 131; Bernhöft, F.: *Staat und Recht in der römischen Königszeit im Verhältnis zu verwandten Rechten*. Amsterdam, 1968. 221 sq.; Kaser, M: *Das altrömische ius*. Göttingen, 1949. 22; Haffter, H.: Geistige Grundlagen römischer Kriegführung und Außenpolitik. In: *Römische Politik und Römische Politiker*. Heidelberg, 1967. 23.

[216] Livius 1, 32, 11–14.

the fact that they did not deliver the things or people demanded by the Romans.[217]) As a matter of fact, there was no need of such declaration of war if the enemy invaded Roman territory; in this case they could immediately and unconditionally begin the counter attack, so the declaration of war implemented by the *fetiales* had any significance only in the case of offensive warfare, initiated by the Romans. The archaic age certainly knew the institution of personal revenge, but the official declaration of war was only employed if the war was waged by the entire community, the *populus*, against another people, which was clearly distinguished from armed conflict between different groups of the aristocracy.[218] In the course of its expansion Rome did not always have the opportunity to keep this ritual; therefore, the characteristically Roman formal conservatism chose the following fiction: The *pater patratus* threw the spear onto a plot of land declared enemy territory near Bellona's temple and the entire ceremony was performed with respect to that plot of land, but the demands towards the enemy were presented by the *legati* of the *senatus*, and they were the ones to declare war.[219] (Sometimes they sent the spear to the people on whom they wanted to declare war.[220]) However, the fetiales's ritual of the declaration of war considerably contributed to the observation of the requirement that the war had to possess some kind of *iusta causa*, and it is not by chance that Cicero, formulating the theory of just war under the influence of Stoic philosophy, connects *aequitas belli* with *ius fetiale*.[221]

The *hasta ferrata aut praeusta sanguinea*, meaning iron tipped or fire hardened spear, mentioned by Livy,[222] also deserves attention. At the same time, it is not known when the iron-tipped spear was substituted for, or when it accompanied the wooden spear hardened in fire, as The Iron Age goes back to the turn of the 8th and 9th century BC. in Italy. It can be assumed though, that in ritual usage the iron-tipped spear could only take the place of the wooden one when it came to be exclusively used in everyday life.[223] The expression

[217] Albert, S.: De vetere iure Romano, de lege duodecim tabularum atque de iure fetiali. *Vox Latina* 34 (1998) 218.

[218] Ziegler: *op. cit.* 103.

[219] Francusci, P. de: Appunti e considerazioni intorno alla "columna bellica". *Atti della Pontificia academia romana di archeologia.* Ser. III. Rendiconti 27. 1951–1954. 1899 sqq.; Dahlheim: *op. cit.* 175 sqq.

[220] Cf. Festus 90.

[221] Cicero: *De officiis* 1, 36; Hausmaninger, H.: "Bellum iustum" und "iusta causa belli" im älteren römischen Recht. *Österreichische Zeitschrift für öffentliches Recht,* 11 (1961) 341 sqq.

[222] Livius 1, 32, 12.

[223] Waele: *op. cit.* 173 sq.

sanguinea is particularly problematic: The word itself can be translated as *consecrated in blood* or *coloured with blood*. However, if it is taken for the denomination of the wooden material, it can mean the branch of the cornel tree, the *sanguineae virgae*, which, being hard wood, constituted a perfectly suitable raw material for the spear.[224] Ammianus Marcellinus mentions in connection with the *fetiales*'s spear that besmearing it with blood played an important role in the course of its manufacturing.[225] The spear of *ius sacrum* made of cornel wood counted as *arbor felix*,[226] but the spear used for the declaration of war was *hasta impura*; i.e., *arbor infelix*, dedicated to the forces of the underworld. Thus, whether the *fetiales*'s spear was coloured with real blood, or made of blood coloured cornel wood, the original *hasta praeusta sanguinea* was later changed for *hasta ferrata sanguine infecta*.[227] The *fetialis* ritually predicts the outcome of war at its very beginning because by symbolically taking the enemy territory into possession with the *hasta impura*, dedicated to the gods of the underworld, he delivers the enemy, the *hostis impius*, bereft of the reason for its existence, to the forces of destruction.[228] (In the light of this, the role of *evocatio*, performed by the Romans before the attack, by which they intended to lure to Rome the gods of the enemy doomed to destruction becomes perfectly clear.[229])

The strongly text-centered nature of *ius fetiale* and *legis actio sacramento* is sufficiently well-known; we know that whoever missed even one word of the text, lost the case.[230] Although in the case of *ius fetiale* we have no *expressis verbis* knowledge of such consequences, it can be rightly assumed that the Romans did not tolerate even the slightest deviation from the text because this would have destroyed the effect of *carmen*, hence it would have endangered the result of the *bellum iustum*, fought with divine help.[231] The oath is an indispensable part of *ius fetiale*. On the one hand, the self malediction of the *pater patratus* on the occasion that he presented unrightful demands in the name of the Roman people; on the other hand, the calling of the gods to witness the lawful procedure of the Romans and the unlawful procedure of

[224] Macrobius, *Saturnalia* 3, 20, 3; Plinius maior, *Naturalis historia* 16, 176; 19, 180; 24, 73. Cf. Waele: *op. cit.* 174.

[225] Ammianus Marcellinus 19, 2, 6.

[226] Macrobius, *Saturnalia* 3, 20, 2.

[227] Scholz: *op. cit.* 32.

[228] Latte: *op. cit.* 122; Scholz: *op. cit.* 32.

[229] Latte: *op. cit.* 125. About this ritual act see Basanoff, V.: *Evocatio*. Paris, 1947.

[230] Gaius, *Institutiones* 4, 11, 30.

[231] Albert: *op. cit.* 220.

the enemy. In the case of *legis actio*, *sacramentum* corresponds to this oath.[232] The oath-like character of *sacramentum* is clearly shown by the original meaning of the word itself.[233] At the same time, it also incorporates the circumstance that the statement of the party taking the oath–e.g., the plaintiff–is true, and accordingly, the statement of his opponent is false. However, if in the end it were proved that the claim of the plaintiff does not stand, then it becomes evident that he committed perjury; i.e., he performed his own *devotio*.[234] (Kaser also suspects that in the beginning the *sacramentum* was related to the divine judgement, but in his view this cannot be sufficiently documented for the period from which written sources exist.[235] It is still a fact that the character of divine judgement can be traced–by analogy–also in this part of *legis actio sacramento*. References to the role played by the oath in the trial can be found not only in literary sources, but in traces, in later legal documents as well.[236]) It seems a further parallel that both *rerum repetitio* and *legis actio sacramento* are originally aimed at regaining the things unlawfully possessed by the opposing party in a peaceful manner, placing arbitrariness and fight under the control of the state, thus limiting their scope and intensity.[237] At the same time, it is a clear difference that whereas in the case of *legis actio sacramento* the parties accept the control and decision of a judge recognized by both of them, in the case of *ius fetiale*, this institution is absent. This is demonstrated by the fact that in the so-called international affairs they could not agree on the competence of legal court–this might be the cause of the absence of the *apud iudicem* stage of *ius fetiale* procedure–it can be rightly assumed though that the Romans found the umpire entitled to decide in the conflict of two nations exactly in the higher powers, who were so often called to witness.[238]

Ius fetiale is a clearly religious system of norms and procedures, as this is shown by references made constantly to the persons and gods acting in it. Nevertheless, *legis actio sacramento*, considered to be an institution of *ius privatum* shows close connection with *ius sacrum*: In the beginning *legis actio* was performed in front of the *rex*, who was present, both in his person and his legitimacy, as a representative of the sphere of the sacred. Then the *in iure*

[232] Kaser: *op. cit.* 21.
[233] Walde–Hofmann: *op. cit.* II. 459 sqq.; Kaser: *op. cit.* 18.
[234] Albert: *op. cit.* 220.
[235] Kaser, M. *Das römische Zivilprozeßrecht.* München, 1966. 62.
[236] Vergilius: *Aeneis* 8, 262 sqq.; Ulpianus, Digesta 4, 3, 21; 47, 52, 27.
[237] Kaser: *op. cit.* 22.
[238] Albert: *op. cit.* 222.

stage of the trial took place in front of the *magistratus*; then, *in concreto*, it took place in front of the *praetor*, who was in terms of his jurisdictional responsibilities an inheritor of the *rex*.[239] The oath, strictly observing the words of the text, was also addressed to the gods, which substantiates the assumption that *legis actio* was closely related to *ius sacrum*.[240] (Certain parallels can be detected between *ius fetiale* and the Twelve Table Law;[241] for example the debtor had thirty days to satisfy the demand of the creditor if he admitted his indebtedness, or if the case was settled by legal decision; similarly, the *pater patratus* had to wait with the *denuntiatio belli* for thirty days after he had announced his demands, according to Dionysius Halicarnassesensis.[242] The reason of both decrees was to help to find a peaceful solution of the conflict within this interval. In line with the relevant loci of the Twelve Table Law order on giving the person who causes damage into *noxa*,[243] *ius fetiale* stipulates the extradition of the person who commits a deed injurious to Rome.[244]) The same intention, meant to restrict the uncontrollable arbitrary enforcement of private demands between the citizens of a state, or between different nations and states, which tried to prevent the state of *bellum omnium contra omnes* by placing the act of solving the conflict under some kind of commonly accepted higher instance, might have stood at the origins of both *ius fetiale* and *legis actio sacramento*.[245]

From the above it can be unambiguously established that the spear and the rod fulfilled the function of generally used symbols of power in the Greek-Roman culture both in the ceremony of *legis actio sacramento in rem* belonging to the field of *ius privatum* and in several proceedings and institutions that can be ranked among the tools of *ius publicum* and *ius sacrum*. In archaic thought, however, a symbol was not considered an image that needs to be interpreted but reality embodying the concept, fact denoted; so this applied to the *hasta* and the *festuca*, which were on the boundary of law and the sphere of the

[239] Földi–Hamza: *op. cit.* 18; Meyer, E.: *Römischer Staat und Staatsgedanke*. Zürich–Stuttgart, 1964. 38, 117; Bleicken, J.: *Die Verfassung der römischen Republik*. Paderborn, 1975. 76 sq.

[240] Cf. Noailles, P.: *Du Droit sacré au Droit civil*. Paris, 1949. 18 sqq.

[241] Donatuti: *op. cit.* 31 sqq.; Hausmaninger: *op. cit.* 338; Bernhöft: *op. cit.* 1968. 221 sqq.; Albert: *op. cit.* 224.

[242] *Leges XII tabularum* 3, 1; Dionysius Halicarnassensis 2, 72, 8.

[243] *Leges XII tabularum* 8, 6. (Ulpianus, Digesta 9, 1, 1 pr.); 12, 2b (Gaius, *Institutiones* 4, 75–76.)

[244] Kaser: *op. cit.* 185. Cf. Livius 8, 39, 14; 9, 8, 6; 9, 10, 2 sqq.; Cicero: *Pro Caecina* 98; *De oratore* 1, 181; 2, 137; *De officiis* 3, 108.

[245] Kaser: *op. cit.* 19, 15.

sacred and served to express *iustum dominium* and *imperium*. This overview might have somewhat highlighted certain important aspects inherent in the rite of *vindicatio* as a kind of *ordalium* deciding the battle–as it was meant to be demonstrated with the phrase *sacrum duellum* used in the introductory passage of this study–which can be explored and interpreted solely through applying the findings of law and the history of religion in synthesis.

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GEORGE MOUSOURAKIS*

Conceptualizing Legal Change: A Comparative Law Approach

Abstract. Legal historians have observed that many legal norms have remained in force for a long time; yet the great degree of social change would prima facie also entail legal innovations. But there have been fewer than expected. Can one construct a general theoretical framework for assessing explanations concerning legal change and legal stability? Further, can such a framework be constructed from the perspective of comparative law? It may perhaps be argued that comparative law is not sufficient for constructing such a theory; a general analysis of society is also needed. But even if concrete conditions, and cause and effect relations cannot be entirely explained by an abstract scheme, it is at least reasonable to hope that such a scheme may clarify some of the basic concepts at work and enhance insights into the nature and progress of law. The first part of this paper considers the nature and scope of comparative law and identifies different approaches to the subject adopted by contemporary comparatists. In the second part, the problem of legal change is discussed from the standpoint of a particular theoretical perspective represented by Professor Alan Watson, one of the most productive post-War comparatists and legal historians.

Keywords: comparative law, historical jurisprudence, legal transplants, factors of legal change

Defining the scope of comparative law

Theories on the nature and development of law can only gain universal validity if they are capable of encompassing many (if not all) systems of law and, in turn, this suggests the prerequisite for a detailed study of at least a range of legal systems. The knowledge jurists depend on when aspiring to devise tools for a proper understanding and construction of legal phenomena cannot be gained by an examination of a single legal system, since law transcends national boundaries, or without a comparison. Like legal history, legal sociology and legal philosophy, comparative law provides jurists with additional perspectives for a more complete understanding of law and, by enriching their intellectual repertory, enables them to better accomplish their tasks. It introduces concepts,

* Professor of Comparative Law, Niigata University, Japan
E-mail: g.mousourakis@auckland.ac.nz

sty les, organizations and categorizations previously unknown, revealing unsuspected possibilities in the very notion of law and thus enabling jurists to more effectively address the legal, social and political issues that legal systems strive to resolve.

Modern comparative law has progressed through different stages of evolution. Influenced by developments in the biological sciences, linguistics and new theories of social evolution during the nineteenth century, comparatists tended to focus, at that time, upon the historical development of legal systems with a view to tracing broad patterns of legal development common to all societies. The idea of the organic evolution of law as a social phenomenon led jurists to search for basic structures, or a 'morphology', of law and other social institutions. They sought and constructed evolutionary patterns with a view to uncovering the essence of the 'idea of law'.[1] Of particular importance to the development of comparative and historical jurisprudence was Sir Henry Maine's work on the laws of ancient peoples. According to Maine, while comparative law, as opposed to the properly so-called jurisprudence, is concerned with the analysis of law at a certain point of time, historical-comparative jurisprudence focuses on the idea of *legal development* or the dynamics of law. But it was F. Pollock, Maine's disciple and successor in his scientific endeavours, who synthesized science and comparative law by drawing attention to the connection or interrelationship between the 'static' point of view of comparative law in a narrow sense and the 'dynamic' approach of historical jurisprudence. To him, jurisprudence itself must be both historical and comparative; in this respect, comparative law plays more than a merely secondary or supporting role, it has a distinct place in the system of legal sciences.[2] The position adopted at the First

[1] According to Franz Bernhöft, '[C]omparative law wants to teach how peoples of common heritage elaborate the inherited legal notions for themselves, how one people receives institutions from another one and modifies them according to their own views, and finally how legal systems of different nations evolve even without any factual interconnection according to the common laws of evolution. It searches, in a nut-shell, within the systems of law, the idea of law'. *Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft*, 1.

[2] As Pollock remarked, "It makes no great difference whether we speak of historical jurisprudence or comparative jurisprudence, or, as the Germans seem inclined to do, of the general history of law." Pollock, F.: The History of Comparative Jurisprudence. *Journal of the Society of Comparative Legislation* 5 (1903) 74 at 76. The influence of t his school of though is reflected in more recent discussions of the nature and aims of the comparative study of laws. Thus, according to Rotondi, comparison is one of two methods (the other being the historical method) whose combination can give us a comprehensive knowledge of law as a universal social phenomenon. Legal science relies upon these methods in order

International Congress of Comparative Law, held in Paris in 1900, as to the nature and objectives of comparative law stressed both the independence of comparative law from other fields of scientific inquiry, and its long-term practical goal, namely the unification of the laws of peoples at similar stages of cultural and economic development through the elimination of the accidental differences between them. At that Congress, the famous French comparatist Raymond Saleilles asserted that the chief aim of comparative law is the discovery, through the study of different national laws, of concepts and principles common to all 'civilized' legal systems, i.e. universal concepts and principles that constitute a relatively ideal law–a kind of natural law with a changeable character.[3] According to Édouard Lambert, a unity of general purpose can be detected in similar legislation from different states, in spite of the absence of such unity at the level of the rules embodied in the legislation. It is thus possible to discern a common basis of legal solutions and establish a 'common legislative law'. The unitary and universalistic mentality underpinning the approach to comparative law adopted in the Paris Congress reflects the influence of schools of thought that dominated European legal science in the nineteenth and early twentieth centuries. One of these schools was the German *Begriffsjurisprudenz* (jurisprudence of concepts). Favouring the construction of grand schemes of systematization, *Bergriffsjurisprudenz* placed strong emphasis on the formulation of abstract, logically interconnected, conceptual categories

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to detect and construe the (natural) laws governing the evolution of this phenomenon. In searching for relations between different legal systems, or families of legal systems, one seeks to discover, to the extent that this is possible, certain stable features in this evolutionary process that may allow one to foreshadow future developments concerning the character and orientation of legal systems and branches of law. Technique du droit dogmatique et droit compare. *Revue Internationale de Droit Comparé* (1968) 13. And see Herzog: Les principes et les methods du droit pénal comparé. *Revue Internationale de Droit Comparé* (1957) 350. And according to Yntema, comparative law, following the tradition of the *ius commune* (*droit commun*), as an expression of the deep-rooted humanist vision concerning the universality of justice, and based on the study of historical phenomena, seeks to discover and construe in a rational way (*en termes rationnels*) the common elements of human experience relating to law and justice. In the world today the primary task of comparative law is to elucidate the conditions under which economic and technological development can take place within the framework of the Rule of Law. Le droit comparé et l' humanisme. *Revue Internationale de Droit Comparé* (1958) 698.

[3] Conception et objet de la science juridique du droit compare. In: *Procès verbaux des séances et documents du Congrès international de droit comparé 1900*, 1905–1907, I, 167 at 173.

as a means of constructing highly systematic bodies of positive law.[4] By comparing conceptual forms the members of this school hoped to find concrete evidence of general, universally valid, legal systematics, and to reveal the common core or essence of basic juridical concepts, even if it was admitted that every legal order has a system of its own.

The works of nineteenth century scholars, which endeavoured to conceptualize legal phenomena on a historical-comparative plane, paved the way for the recognition of comparative law as a science and an academic discipline. During the twentieth century, however, many comparative law scholars, most notably Gutteridge and David, adopted the view that comparative law was no more than a *method* to be employed for diverse purposes in the study of law. According to this view, comparative law is no more than a means to an end and therefore the purposes for which the comparative method would be utilized should provide the basis for any definition of comparative law as a subject. This approach entailed a shift in emphasis from comparative law as a science to the uses of the comparative method in the study of law. By focusing on the uses, aims or purposes of comparative study, comparatists divided their activities into categories such as 'descriptive comparative law' or 'comparative nomoscopy', signifying the mere description of foreign law; 'applied comparative law' or 'comparative legislation', referring to the use of foreign law for the purpose of reforming one's own legal system; 'comparative nomothetics', concerned with the evaluation of foreign law; 'comparative nomogenetics' or 'comparative history of law', focusing on the evolution of legal norms and institutions; and 'abstract or speculative comparative law' or 'comparative jurisprudence', with respect to which the comparative method was designed to assist sociologists and legal philosophers.[5] However, the above divisions do not militate against the basic unity of comparative law as a scientific method. As Gutteridge points out, comparative law is not made up of a variety of independent inquiries related to each other only by virtue of the fact that they all involve the study of different legal systems. The basic feature of comparative law, as a method, is that it can be applied to all types and fields of legal inquiry.[6]

In general, a distinction may be drawn between three types of comparative legal inquiry: *idealistic, realistic and particularistic*. From the idealistic viewpoint, legal order is seen as a normative matter that is present in the factual legal

[4] See e.g., Puchta, G. F.: *Cursus der Institutionen*. I, 1841. esp. 95–108; Windscheid: *Lehrbuch des Pandektenrechts*. 1891. I. 59–60.

[5] See in general, Gutteridge, H. C.: *Le droit compare*. Paris, 1953. 20.

[6] *Ibid.* at 28. And see Langrod, G.: Quelques réflexions méthodologiques sur la comparaison en science juridique. *Revue Internationale de Droit Comparé* (1957) 363.

order although it cannot be identified with it. The realistic perspective, on the other hand, is based upon an empirical view of legal order. Both the idealistic and realistic approaches are concerned with the problem of generalization. The study of legal orders brings to light innumerable differences and similarities. Idealistic universalism seeks to discover the *ideal of law*, which is present in all legal orders; realistic universalism seeks to reveal the *sociological laws* governing legal phenomena. In spite of their theoretical juxtaposition, both approaches have universalism in common: they are not content with a mere description as they want to *systematize*, to find out general means of explanation to account for legal phenomena irrespective of time and place. Those who follow a *particularistic* approach to comparative law, by contrast, claim that general schemes are too abstract to serve as goals of study. This approach, quite common in the contemporary practice of comparative law, tends to reduce comparative law to a detailed description of different legal orders. From this point of view, comparison is only a translation of valid legal orders into one language. In most cases, however, some kind of intermediate position between universalism and particularism is sought, as far as it is recognized that there are both general and particular features in every legal order.[7] It might be said that the universal and individual features of legal phenomena are *different* aspects of a uniform whole, although both aspects are in order to grasp reality. The more general a description is, the more phenomena of concrete life it covers, and the better it is as a scientific description, but the less does it represent a particular form of life. The exact course of historical events is always individual and can be explained only by reference to its particular elements; but the broad outline of the events is subject to general socio-historical laws. Even though legal sociology might strive towards a universalist knowledge of law, as does legal philosophy in a different sense, comparative law is by its own nature forever bound to vacillate between the general and the particular. The comparative process may be described as dialectical, since it focuses upon the inter-connection between general principles and concrete observations made when these principles are applied in practice. Thus, the general explanatory background is concretized in particular cases; at the same time, a general historical outlook enables one to make certain generalizations from particular events within the framework of a general model of explanation.

The role of comparative analyses in the field of legal history deserves special attention. The history of law explores the sources of legal phenomena, and the evolution of legal systems and individual legal institutions in different

[7] This reflects the Aristotelian view of legal order as a result partly of natural regularities and laws, and partly of human will.

historical contexts. It is concerned both with the history of a single legal order and the legal history of many societies, the universal history of law. By comparing different legal systems at different stages of development, legal historians attempt to trace the evolution of legal institutions and the historical ties that may exist between legal systems. Historical analyses of law utilizing the comparative method are essential for understanding the development of legal systems. Without the knowledge derived from historical-comparative legal studies it is impossible to investigate contemporary legal institutions, as these are to a great extent the products of historical conditions, borrowings and mutual influences of legal systems in the past.

Legal historians have observed that many legal norms have remained in force for a long time; yet the great degree of social change would prima facie also entail legal innovations. But there have been fewer than expected. How can the relative longevity of law be explained? One might say that there are social structures that have remained largely unchanged and that, accordingly, should be used to explain the longevity of some legal norms or institutions. But an obscure reference to some structure carries little weight as an explanation. The question is: can on e construct a general theoretical framework for assessing explanations concerning legal change and legal stability? Further, can such a framework be constructed from the perspective of comparative law? It may perhaps be argued that comparative law is not sufficient for constructing such a theory; a general analysis of society is needed. But even if concrete conditions, and cause and effect relations cannot be entirely explained by an abstract scheme, such a scheme may clarify some of the basic concepts at work and enhance insights into the nature and progress of law.

The following paragraphs consider the questions of legal change and legal stability from the viewpoint of comparative law. The discussion will focus on aspects of the legal change theory developed by Professor Alan Watson, one of the most productive post-War comparatists and legal historians.

A comparative theory of legal change?

Since the publication of the first edition of his seminal book, Legal Transplants: An Approach to Comparative Law in 1974, Watson has produced many works on the relationship between law and society, and the factors accounting for legal change.[8] In these works he iterates his belief that changes in a legal

[8] See, e.g., Watson, A.: Aspects of Reception of Law. *American Journal of Comparative Law* 44 (1996) 335; Comparative Law and Legal Change. *Cambridge Law*

system are due to legal transplants: the transfer of legal rules and institutions from one legal system to another. 'Legal transplanting' involves a legal system incorporating a legal rule, institution or doctrine adopted from another legal system. It may also pertain to the reception of an entire legal system, which may occur in a centralist way, as displayed by the introduction of the Napoleonic Code in many European countries. However, in most cases foreign rules or doctrines are 'borrowed' in the context of legal practice itself, because they fill a gap or meet a particular need in the importing country. Until the nineteenth century legal transplanting mainly occurred within Europe. In the course of the nineteenth and twentieth centuries European laws were transplanted in many countries around the world either directly or through the adoption of European codes. During the same period, English Common law spread through the colonies of the British Empire in North America, Australia, New Zealand and parts of Asia and Africa. In the past few decades, many institutions of Anglo-American law have been adopted by countries of Continental Europe.[9] Legal transplanting is also associated with the so-called 'hybrid' legal systems, i.e. systems whose development was influenced by two or more legal traditions.[10] To understand the reception of foreign law phenomenon one must examine the reasons behind the introduction of foreign law in a particular case (e.g. whether it is the result of conquest, colonial expansion or the political influence of the state whose law is adopted,[11] or it pertains to the perceived quality and prestige

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Journal (1978) 313; Legal Transplants and Law Reform. *Law Quarterly Review* (1976) 92; *Society and Legal Change*, Philadelphia, 1977; *Sources of Law, Legal Change, and Ambiguity*. Philadelphia, 1984; *Legal Origins and Legal Change*. London, 1991; *The Evolution of Western Private Law*. Baltimore, 2001. And see R. Sacco: Legal Formants: A Dynamic Approach to Comparative Law. *American Journal of Comparative Law* (1991).

[9] An example is the concept of 'trust', originally an Anglo-American legal concept, which has been adopted by many Continental European legal systems.

[10] Such as, for example, South Africa (Roman-Dutch and English influence), Québec (French and English influence) and Louisiana (French and American influence).

[11] Territorial expansion through military conquest (such as the Roman expansion in the Mediterranean world; the settlement of Germanic peoples in Europe; the expansion of Islam in Africa and Asia; and the Spanish conquests in Central and South America) did not always entail the imposition of the conquering peoples' laws on the subjugated populations (for example, in lands under Germanic and Islamic rule subject populations continued to be governed by their own systems of law under the so-called 'principle of the personality of law'). In some cases a direct imposition did in fact occur (consider, for example, the introduction of Spanish law in South America), while in others the law of the conquering nation was introduced in part or in an indirect fashion (for example, during the British and French colonial expansion there was a tendency to introduce into the colonies elements of

of the adopted law).[12] This analysis must also address the roles that legal science, legal education and the legal profession play in the reception process; the form of the imported law (whether it is a written, customary or judge-made law); and whether (or to what extent) the importing and exporting countries are compatible with respect to culture, socio-economic structure and level of development, as well as the outcomes of legal transplanting.

The destinies of legal transplants in different cultural, socio-economic and political contexts are important to examine for determining the desirability and applicability of such transplants for legislative and judicial practice. It may be true that ethno-cultural, political and socio-economic differences between the exporting and the importing countries do not preclude the successful transplantation of legal rules and institutions. Legal rules can be taken out of context and can serve as a model for legal development in a very different society. However, one should keep in mind that an imported legal norm is occasionally ascribed a different, local meaning, when it is rapidly indigenized on account of the host culture's inherent integrative capacity. It is not surprising that, very often, European legal concepts, institutions and rules imported by non-Western countries are understood in a way that is different from that in the donor countries. The absence of substantial differences in the wording of a statute law from the donor and the host countries does not imply that legal reality, or everyday legal and social practice in the two countries, should be identical or similar. The legal reality in the host country may be very different with respect to the way people (including judges and state officials) read, interpret and justify the relevant law and the court decisions based on it. Moreover, the role of statute law in the recipient country may be much weaker than it is in the exporting country and custom may be a predominant factor. Thus, in practice, social rules might effectively prevent people from initiating a legal claim or even using a court decision supporting such a claim. As this suggests, it is not good sense to use the perspective and framework of one's own legal culture when examining a law or legal concept in a legal system operating within the context of another culture. Such an approach carries the risk of implying the

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the legal systems of the colonial powers or to develop systems of law adapted to local circumstances but largely reflecting the character of the metropolitan systems).

[12] Consider, for example, the reception of Roman law in Continental Europe. Many centuries after the demise of the Roman state, the jurists of Western Europe came to regard Roman law as intellectually superior to other systems of law. Seen as constituting an expression of natural reason, Roman law was received in Europe not by virtue of any theory concerning its continued validity as part of the positive law, but in consequence of its own inherent worth. In other words, its validity was accepted not *ratione auctoritatis*, but *auctoritate rationis*.

existence of many more similarities than there actually are.[13] It would be impossible to understand the very idea of Western legal tradition without recognizing the enormous variety of legal norms and styles that are common within it, not only within the Civil law and the Common law domains, but also across the borders of these legal families.

According to Watson, the nomadic character or rules proves that the idea of a close relationship between law and society is a fallacy.[14] Law is largely autonomous and develops by transplantation, not because some rule was the inevitable consequence of the social structure, but because those who control law-making were aware of the foreign rule and recognised the apparent benefits that could derive from it.[15] Watson does not contemplate that rules are borrowed without alteration or modification; rather, he indicates that voluntary transplants would nearly always–always in the case of a major transplant–involve a change in the law largely unconnected with particular factors operating within society.[16] Neither does Watson expect that a rule, once transplanted, will operate in exactly the same way it did in the country of its origin. Against this

[13] As Watson has remarked, "except where the systems are closely related, the differences in legal values may be so extreme as to render virtually meaningless the discovery that systems have the same or a different rule". *Legal Transplants*, 5. For example, consider the difficulties surrounding the interpretation of the concept of individual freedom, as found in international treaties on human rights. Individual freedom has a rather different meaning in China and other Asian countries, as compared to the Western view, not just because of a political ideology currently or formerly imposed by the rulers of those countries, but because of a more basic, culturally embedded ideology that originates from a very different, collectivist world view. For an elaboration of the theory of legal transplants see Ewald, W.: Comparative Jurisprudence (II): The Logic of Legal Transplants. *American Journal of Comparative Law* 43 (1995) 489.

[14] *Legal Transplants*, 2nd ed. 1993. 108. On the view that law is the result of the social needs of a given society see in general Friedmann, W.: *Law in Changing Society*. 1959; Damaska, M.: *The Faces of Justice and State Authority* 1986; Friedman, L. M.: *A History of American Law* 18 (1973) 595.

[15] Watson, A.: Comparative Law and Legal Change. *Cambridge Law Journal* 37 (1978) 313, 313–315 and 32.

[16] Watson has identified a number of factors that determine which rules will be borrowed, including: (a) accessibility (this pertains to the question of whether the rule is in writing, in a form that is easily found and understood, and readily available); (b) habit (once a system is used as a quarry, it will be borrowed from again, and the more it is borrowed from, the more the right thing to do is to borrow from that system, even when the rule that is taken is not necessarily appropriate; (c) chance (e.g., a particular written source may be present in a particular library at a particular time, or lawyers from one country may train in, and become familiar with the law of another country); and (d) the authority and the prestige of the legal system from which rules are borrowed.

background, Watson argues that comparative law, construed as a distinct intellectual discipline, should be concerned with the study of the historical relationships between legal orders and the destinies of legal transplants in different countries.[17] On this basis one may identify the factors explaining the change or immutability of law.[18] Watson asserts that comparative law (which he distinguishes from knowledge of foreign law) can enable those engaged in law reform to better understand their historical role and tasks. It can provide them with a clearer perspective as to whether and to what extent it is reasonable to appropriate from other systems and which systems to select; and whether it is possible to accept foreign legal rules and institutions with or without modifications.[19]

Watson attempts to construct a comprehensive theory of legal change from ancient times to the modern era. He has the requisite qualifications: he is a distinguished Romanist. An important part of his work is concerned with the worldwide reception of Roman law and its admirable longevity as a system under different socio-economic conditions. The Roman law, as shaped by the compilers of the Justinianic codification in the sixth century AD, has been one of the strongest forces in the development of Western law. Although Justinian sought to produce, on the basis of the legal inheritance of the past, an authoritative statement of contemporary law, his system was adopted and applied by most European countries during the Middle Ages and the Renaissance; in wide

[17] *Legal Transplants*, 6.

[18] *Legal Transplants*, 21. To illustrate this, Watson mentions a set of rules concerned with matrimonial property, which traveled "from the Visigoths to become the law of the Iberian Peninsula in general, migrating then from Spain to California, [and] from California to other states in the western United States". *Ibid.* at 108. He adds, that if one considers a range of legal systems over a long term "the picture that emerge[s] is of continual massive borrowing ... of rules". *Ibid.* at 107. On this basis he concludes that the moving of a rule or a system of law from one country to another has now been shown to be the most fertile source of legal development, since "most changes in most systems are the result of borrowing". *Ibid.* at 94. Watson's theory of legal transplants has been challenged by some scholars. See e.g. Legrand, P.: The Impossibility of "Legal Transplants". *Maastricht Journal of European and Comparative Law* 4 (1997) 111; What 'Legal Transplant'? In: Nelken, D.–Feest, J. (eds): *Adapting Legal Cultures.* Oxford, 2001. 55; Wise, E. M.: The Transplant of Legal Patterns. *American Journal of Comparative Law*, 1990. 1; Murdock, G. P.: How Culture Changes. In: Shapiro, H. (ed.): *Man Culture and Society.* Oxford, 1990, 256. Consider also Cotterrell, R.: Is there a Logic of Legal Transplants? In: Nelken–Feest (eds): *op. cit.* 71.

[19] Despite the rather far-reaching nature of some of his statements, it is important to observe that Watson has generally confined his studies, and the deriving theory of legal change, to the development of private law in Western countries.

areas of Germany and other European regions it remained an immediate source of law until the end of the nineteenth century. Roman private law was used in Catholic, Calvinist and Lutheran countries; it operated in countries where agriculture dominated economic life and it also applied in mercantile centres and later in countries undergoing the industrialization process. This law, first adopted in Europe, was directly or indirectly (through a European law code) transplanted in South America, Quebec, Louisiana and many countries in Asia and Africa. But why was Roman law adopted? The medieval reception of Roman law was partly due to the lack of centralized governments and developed formal legal systems that could compete with the comprehensive inheritance of Rome; and partly due to the fact that the lands formerly governed by the Romans were accustomed to this style of thought, and accorded it wisdom and authority. A third feature, deriving almost completely from the model of the Corpus Iuris Civilis, was the desire of most countries to codify their law and the aspirations of later jurists to conform their studies to this model. But Roman law was not adopted merely because it was admired, nor because its norms were particularly suitable for the social conditions in the early European nation-states. In fact, many norms of Roman law were entirely antiquated. Foremost, it was the perceived superiority of Roman law as a system that led to the adoption of its norms, even if this adoption was supported by a learned tradition that endured for centuries. Juridical norms and their systematic organization are more perennial than most rules of current law. This is, of course, partly due to the existence of common problems, but also partly due to historical tradition, the fact that Roman law has been an important common denominator of most Western legal experience. Thus the conceptual system of Roman law may be said to be an apt tertium comparationis, as it constitutes a common basis of the legally organized relationships of life in the West.[20]

The experience of the legal historian underlies Watson's scepticism towards the view that law is directly derived from social conditions. According to him, history shows that legal change in European private law has occurred mainly by transplantation of legal rules and is not necessarily due to the impact of social structures. He sees legal change as an essentially 'internal' process,[21] in the sense that sociological influences on legal development are considered

[20] Legal relationships are to a large extent organized by forms derived from Roman law. One might say that these forms constitute a kind of *pre-knowledge* for Western legal systems.

[21] He speaks of an 'internal legal logic' or of 'the internal logic of the legal tradition' governing legal development. See Watson, A.: *The Evolution of Law.* Philadelphia, 1985, 21–22.

generally unimportant. The evidence to support this position is derived from history, which Watson claims to show: that the transplanting of legal rules between systems is socially easy even when there are great material and cultural differences between the donor and recipient societies; that no area of private law is very resistance to change through foreign influence–contrary to the sociologically oriented argument that culturally rooted law is more difficult to change than merely instrumental law;[22] and that the recipient legal systems require no knowledge of the context of origin and development of the laws received by transplantation from another system.[23] Social, economic, and political factors affect the shape of the generated law only to the extent they are present in the consciousness of lawmakers, i.e. the group of lawyers and jurists who control the mechanisms of legal change. The lawmakers' awareness of these factors may be heightened by pressure from other parts of society, but even then, the lawmakers' response will be conditioned by the legal tradition: by their learning, expertise and knowledge of law, domestic and foreign. Societal pressure may engender a change in the law, but the resulting legal rule will usually be adopted from a system known to the lawmaker and often modified without always a full consideration of the local conditions. Watson stresses that law is, to a considerable extent, a phenomenon operating at the level of ideology; it is an autonomous discipline largely resistant to influences beyond the law itself. From this point of view, he argues that the law itself provides the impetus for change. At the same time, he recognizes that there is a necessary relationship between law and society, notwithstanding that a considerable disharmony tends to exist between the best rule that the society envisages for itself and the rule that it actually has. The task of legal theory with comparative law as the starting-point is to shed light on this relationship and, in particular, to elucidate the inconsistencies between the law actually in force and the ideal law, i.e. the law that would correspond to the demands of society or its dominant strata. As this suggests, Watson's theory is basically idealistic.[24]

[22] See on this Levy, E.: The Reception of Highly Developed Legal Systems by Peoples of Different Cultures. *Washington Law Review* 25 (1950) 233.

[23] A. Watson: Legal Transplants and Law Reform. *Law Quarterly Review* 92 (1976) 79, 80–81.

[24] According to Watson, "It should be obvious that law exists and flourishes at the level of idea, and is part of culture. As culture it operates in at least three spheres of differing size, one within another. ... The spheres are: the population at large, lawyers and lawmakers. By 'lawmakers' I mean the members of that elite group who in a particular society have their hands on the levers of legal change, whether as legislators, judges, or jurists. ... For a rule to become law it must be institutionalized. It must go through the stages

In an article published a few years after Legal Transplants, Watson delineated the factors that control the relationship between legal rules and the society in which they operate.[25] Consideration of these factors is crucial to understanding the phenomenon of legal change. Whilst Watson admits that it is extremely difficult to determine the relative weight or impact of each factor, he specifies that their interaction should a priori be assessed as more important than the relative evaluation of the individual factors. In this respect, his model may be described as holistic. The factors are the following:

- Source of law
- Pressure force
- Opposition force
- Transplant bias
- Law-shaping lawyers
- Discretion factor
- Generality factor
- Inertia
- Felt needs

Watson recognizes that there may be some common elements in these factors. Indeed, it could even be maintained that some factors are only different aspects of the same problem, at least when applied to concrete contexts of legal change. This again is due to the inevitable interconnections between the matters considered. Even though on e might question whether Watson's scheme is the optimal method for presenting a comparative theory of legal change, one cannot deny the relevance of the observations he presents under the heading of 'factors'. Therefore, I shall proffer a short account of the factors and the way they operate.

According to Watson, the development of a legal system is influenced by the nature of the predominant source or *sources of law*, whether this is custom, statute, code, judicial precedent or juristic doctrine. Precedent-based law develops more slowly than statutory law because such law "must always wait upon events, and, at that, on litigated events"; "there is no way of defining precisely the *ratio decidendi* of a particular case", for "only when there is a line of cases does it become possible to discover the principle underlying even

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required for achieving the status of law. ... Because lawyers and lawmakers are involved in all those processes a rule cannot become law without being subject to legal culture." Legal Chance: Sources of Law and Legal Culture, *University of Pennsylvania Law Review* (1983) 1121, 1152–1153.

[25] Comparative Law and Legal Change. *Cambridge Law Journal* 37 (1978) 313–336. Although these factors pertain primarily to the Western legal tradition, Watson believes that they are valid also outside this sphere of legal culture.

the first case".[26] Thus, precedent-based law is always retrospective, whereas statutory law looks forward. While law based on precedent is slow to change, statutory law, which is more systematic and broader in scope, can be relied upon to introduce drastic and swift reforms. Moreover, development by statute with its more adequate theoretical basis can point the way to further reform. Watson also draws attention to the historical roots of the sources-of-law doctrine in different legal orders. It should be noted, however, that in many cases it is only legal change that determines the character of the sources-of-law doctrine and not vice versa. If social, economic, political or ideological change generates a need for revision of the law, the bonds with the sources of law (whether precedents or statutes) are loosened. Further, one should not over-emphasize the capacity of a statute-law system to foresee problems. If there is a 'gap' in written law, a court will often find it difficult to engage in the same sort of creative activity as its counterpart can in a seemingly 'retrospective' *stare decisis* system.

The term *pressure force* refers to the organized group or groups of persons who believe that they would derive a benefit from a practicable change in the law. Watson says that the power wielded by a group to effect legal change varies in accordance with the social and economic position of its members and its capacity to act on a particular source of law. Pressure forces of different constitutions have varying effects upon individual sources of law, and different sources respond to pressure in different ways. In general, development by legislation is more affected by pressure forces than development by precedent. Watson stresses the independence of judges in precedent-based systems. As judges are not elected and their role is not seen as primarily political, they cannot be subject to direct pressure by organized groups, nor can they easily be swayed by general policy issues. He adds that juristic doctrine, as a source of law, is also mainly immune from pressure forces, except where a pressure force has great power and authority (e.g., not only an established Church, or the ruling party in a totalitarian state can directly and indirectly influence juristic doctrine but the doctrine itself can gain strength because of its connection with the dominant ideology). I think that Watson over-emphasizes the immunity of judges and jurists from external pressure. He says, for example, that a jurist's opinions would lose authority if a pressure force directly influenced him. But this pertains only to the pressure forces motivated by a newly-invented idea or need. Usually there is a system of permanent pressure forces in society, and most lawyers belong to that system. It is important to consider whether or to

[26] *Ibid.* at 323.

what extent judges and jurists are susceptible to political arguments, and the degree of participation in politics they are permitted in different systems.

Opposition force is the converse of a pressure force and embodies the organized group or groups of persons who believe that harm will result from a proposed change in the law. For an opposition force to exist, it is required that the group that would be adversely affected by the change is adequately organized. Watson remarks that although the persons who will be adversely affected by a proposed change in the law may be more numerous than those who will benefit, the change will most likely be executed if the anticipated gains of each member within the latter group is extensive, whereas the perceived harm to each member of the former group is small. The absence of an organized opposition force in such a case explains why legislation that is overall harmful and generally considered unpopular is occasionally passed without much resistance.

Transplant bias harrsid is an essential element of Watson's theory that legal change primarily occurs through the appropriation or imitation of norms. It refers to a system's receptivity to a particular foreign law as a matter distinct from acceptance based on a thorough assessment of all possible alternatives.[27] This receptivity varies from system to system and its extent depends on factors such as the linguistic tradition shared with a potential donor system; the general prestige of the possible donor system; and the educational background and experience of the legal professionals in the recipient system. Watson also draws attention to the interaction of the factors determining legal development, pointing out that transplant bias interacts particularly with the sources of law. The adoption of an entire foreign legal code is probably the clearest manifestation of transplant bias. Juristic doctrine is also very susceptible to foreign influence. This is evidenced by the fact that the reception of Roman law in Continental Europe first occurred in the field of legal science. Precedent, on the other hand, seems to be least affected by transplant bias. When judges borrow from foreign legal systems, the value of the foreign rule for the judge's own system is often carefully considered and evaluated. In analyzing transplant bias one must bear in mind that, according to Watson, law develops principally through the adoption of rules and structures from elsewhere. The nature of this factor has an authoritative argument form such as: norm N is a Roman law norm–Roman law is superior–therefore, norm N should be accepted. Behind the *minor* premise of this inference there is no general appraisal of all norms of Roman law, but rather an opinion based upon the *systematical coherence* of

[27] Transplant bias may be used to denote, for example, a system's readiness to accept a Roman law norm *because* the norm is derived from Roman law.

the relevant norm. The assertion, 'Roman law is superior', is neither deductive (i.e. based upon an axiom concerning the superiority of Roman law) nor inductive (where one should present reasons for considering the particular norm N good); rather it is quasi-inductive and systematical.

Law-shaping lawyers are the legal elite that shape the law and whose knowledge, imagination, training and experience of the world and legal ideas strongly influence the end product of any change in the law. Watson notes that lawyers are well-placed to act as pressure or opposition forces. Their knowledge of how the legal system actually works means that they are fully aware of how the current law or its change affects their well-being. Besides this, legal professionals mould the law, in developed legal systems at least, in many ways: as members of parliamentary or governmental committees they are directly involved in the drafting of legislation; as judges they determine the shape and form of judicial precedents; and as jurists they contribute to the development of juristic doctrine and its recognition as a source of law. Watson observes that law-shaping lawyers are a factor one could remove as their functions are adequately covered by the notions of source of law and transplant bias, but they contribute such a particular flavour that their role deserves specific attention. In his more recent work, however, Watson places greater emphasis on the role of legal culture in shaping law's internal development.[28] According to him, legal culture pertains to the general outlook, practices, knowledge, values and traditions of the legal elite of a legal system.[29]

[28] As Watson points out, "[l]egal change comes about through the culture of the legal elite, the lawmakers, and it is above all determined by that culture". Watson, A.: *The Evolution of Western Private Law*. Baltimore, 2001, 264.

[29] From the viewpoint of the autopoiesis theory, G. Teubner criticizes Watson for placing too much emphasis on the lawyers' professional practices as such. Teubner argues that these practices are not, in themselves, the motor of legal change but rather the necessary outcome of law's character as a distinctive discourse concerned chiefly with producing decisions that define what is legal. Because what is legal is law's essential focus as an independent discourse, law cannot be governed by social developments of the kind sociologists are concerned with. It may react to these developments but it always does so in its own normative terms. Thus, what Watson sees as the autonomous law development by legal elites, proponents of autopoiesis theory regard as the working out of law's independent evolution as a highly specialized and functionally distinctive communication system. For a closer look see in general Luhmann, N.: *Social Systems*, 1995; Teubner, G.: *Law as an Autopoietic System*. Cambridge, 1993; Priban, J.–Nelken, D. (eds): *Law's New Boundaries: The Consequences of Legal Autopoiesis*. London, 2001. On the implications of the autopoiesis theory for comparative law see Teubner, G.: Legal Irritants: Good Fath in British Law or How Unifying Law Ends U p in New Divergences. *Modern Law Reriew* 61 (1998) 11.

The *discretion factor* refers to the implicit or explicit discretion that exists either to enforce or not enforce the law, or to press or not press one's legal rights. In Watson's words, the discretion factor is concerned with "the extent to which the rules permit variations, or can be evaded ... or need not or will not be invoked".[30] He observes that some degree of discretion is an inevitable element in any developed legal system. This discretion may be possessed by individual parties, judges, the executive or actually be built into the legal rules themselves. By providing choice the discretion factor tends to mitigate the apparent undesirable requirements or consequences of legal norms, thus prompting an easier acceptance of these norms. However, Watson does not fail to note that an abuse of discretion will entail an adverse reaction. It is true that discretion creates choice, but the use of choice depends on certain other factors. It might be the case, for example, that a controversial parliamentary bill is passed as law after the most questionable paragraphs have been recast in such a way as to enable the judiciary or the executive to exercise discretion (e.g. open wording, general clause s or flexible criteria are used). However, this transfers the problem to another level of decision-making. At that level of *micro* decision-making, the principle pertaining to the equal treatment of the subjects of law plays a more important part than at the level of law-making, where the criteria of formal justice are introduced. From a comparative point of view, it should be stressed that a mere statement of discretion is rarely sufficient, as discretion is exercised according to some *criteria* and not at random. To understand how the discretion factor influences the state and development of the law, one should identify both the factual and the evaluative criteria of discretion.

The *generality factor* denotes the extent to which legal rules regulate more than one recognizable group of people, or more than one transaction or factual situation. Watson points out that the greater the generality of law, the more difficult it is to find a rule that precisely fits the situation of each group, or transaction or factual situation being regulated. He adds that the greater the generality of a proposed change in the law, the greater the difficulty of securing agreement on the appropriate rule or rules, and hence the greater the difficulty of bringing about legal change. The generality factor interacts to a considerable extent with the pressure or opposition forces. If the scope of the proposed change in the law is too narrow, the pressure force supporting it may have little influence. If, on the other hand, the scope of the proposed change is too broad, it is likely to produce an opposition force as such a change is unlikely to satisfy all the groups concerned. A connection also exists between the generality factor

[30] Comparative Law and Legal Change. 330.

and the sources of law: to carry out a legislative change a degree of generality is needed. In comparative studies it is useful to draw a distinction between *abstract* generality and *actual* generality.[31] There may be norms addressed 'to whom it may concern', i.e. to anyone. For example, drug trafficking may be a criminal offence and prohibited to everyone. Despite the abstract character of the relevant norm, the prohibition it produces, in reality, concerns a relatively small number of people. On the other hand, there may be norms addressed to a particular group of people that is so large in number that the norms are practically general.

Inertia is defined by Watson as the general absence of a sustained interest of society and its ruling elite to struggle for the most 'satisfactory' rule. For law to be changed there must exist a sufficiently strong impulse directed through a *pressure force* operating on a *source of law*. This impulse must be strong enough to overcome the inertia. But how can inertia be explained? Watson notes that society's essential stake in law is order, and to maintain order there cannot be a consuming interest in the precise nature of the particular rules and their reform. There is a *normal desire for stability* and society, particularly the dominant elite, have a generalized interest in maintaining the status quo. This reflects an abstract interest in stability, which is linked to the fact that many legal norms have no direct impact on the lives of most citizens. According to Watson, besides the mystique surrounding law, practical considerations may obstruct legal change. Legal professionals may oppose legal reforms because they would have to learn new rules and juristic techniques. Moreover, as every legal reform entails a considerable cost, priorities must be assessed with regard to limited resources. Perhaps the case is that anticipated long-term benefits are not sufficient to justify a reform if the costs are not outweighed by the short-term benefits. Watson argues that inertia as a factor in the relationship between law and society is not accorded the attention it deserves. He remarks that, as a matter of fact, societies often tolerate much law that has no correspondence with what is 'needed' or regarded as efficient. To understand the rationale one must consider the phenomenon of legal inertia and the various elements of its composition. Legal inertia has, I think, two aspects. First, it renders a 'static' justification of law sufficient: law is justified by past behaviour and behaviour by norms. This kind of inertia is inherent in all legal decision-making that strives to maintain regularity and predictability in the practice of law. Besides this aspect of inertia, inertia also relates to the structure and function of law in

[31] Abstract generality is a typical feature of legislation. As stated by the classical Roman jurist Ulpian: "*iura non in singulas personas, sed generaliter constituuntur*". Digest 1, 3, 8.

society. There are two kinds of structural matters for consideration: *(a)* law is to a certain extent *resistant* to certain social change, and society to certain legal change, and *(b)* there is a 'relative resistance' to change pertaining to the *time-lag* between different functionally interdependent changes.

Felt needs are the purposes known to, and regarded as appropriate by, a pressure force (not the ruling elite or society as a whole) that operates on a source of law. Watson recognizes that elucidating the nature of felt needs is not always easy. He declares that these are discoverable through an examination of words, deeds and effects: what the pressure force says is needed; how its constituent elements act both before and after the legal change is effected; and how the change actually impacts upon the interests of the pressure force. There are also needs that may be general, well-recognized and enduring in time. But unless these are supported by an active pressure force they are not 'felt needs' as understood by Watson, even though consideration of these 'other needs' is important for anyone interested in understanding the relationship between law and society.

The question posited is how should Watson's nine 'factors' be used? He declares that, by relying upon these factors, one may devise models for legal development and the relationship between law and society. At the same time, by considering the interaction of these factors one can find answers to many perplexing questions concerning legal development. There are balances between the factors supporting change and the factors opposing change. According to Watson, the relationship between a society and its legal rules could be generally expressed as a mathematical equation: a legal rule will be stable when felt needs, weakened by the discretion factor, activating a pressure force as affected by the generality factor, to work on the relevant source of law, are less potent than inertia and opposition force combined; on the other hand, some legal change will occur when the force of felt needs, weakened by the discretion factor, activating a pressure force as affected by the generality factor, to work on a source of law, all as modified by the transplant bias and law-shaping lawyers, is greater than the force of inertia plus the opposition force. In other words, the precise relationship between legal norms and the society in which they operate can be expressed as the balance between two opposing sets of factors; the first inhibits change and the second supports change. A legal change occurs when the force of the second set of factors is greater than the force of the first set of factors, although the nature of the change is determined by the balance and relative weight of the various factors. In Watson's model one cannot locate a direct reference to concepts and elements that are commonplace in modern analyses of society. Neither society at large nor its dominant strata are regarded as factors. Legal change is triggered by pressure forces, not by society as a

whole, or its ruling elite. As he says, the pressure force and the society, or the pressure force and the ruling elite, are often co-extensive. Further, in a non-democratic political system the ruling elite operates directly on the principal sources of law, enjoying a kind of monopoly with respect to legal change. In any country, the extent to which the pressure force and the society or its ruling elite are the same must be determined by a specific inquiry, although one must recall that, even if society at large or its ruling elite operate as the pressure force, legal rules are not necessarily the most efficient means of using social power to initiate reforms.

Watson claims that his model is useful for elucidating certain difficult issues pertaining to legal development.[32] But the model is *not deterministic*. He elaborates that, although existing elements in a society may determine the options that are known or knowable, and hence available, they do not predetermine the necessary outcome. In my view, this suggests that Watson's factors can only furnish the basis for a method of presenting relevant aspects of legal change in a generally valid manner. No objections of principle could be raised against such a method. The objections are, rather, of a practical nature. One might argue, for example, that Watson's *felt needs* and *pressure forces* do not direct enough attention to the fact that there are not only supporters and opponents of a proposed legal change. Often there is at least a degree of unanimity concerning the necessity for legal reform, but there are differing opinions as to the content of the planned legislation. In this case, the pressure forces and relevant interests cannot be seen as diametrically opposite. Interests can be construed as vectors which in concrete situations have a certain direction and strength (when compared to other social vectors). It is difficult to state that the law in question is a result of the goals of one interest group if this law is more allied to its interests than those of another group. This vie w excludes the immediate authority of conflicting background interests and statements of goals. But this does not mean that it is incorrect to refer to the social impact of different decision-alternatives;

[32] For example, it is often said that there is a close connection between commerce and law, especially the law of contract, and that economic growth engenders legal change. But the Scots law of contract developed rapidly between the years 1633 and 1665 (it was during this period that the main forms of contract and the general principles of contract law were recognized), even though, as is well known, this period was characterized by economic stagnation. By contrast, in England, which was much more developed economically and commercially, there could scarcely be said that a general law of contract or general principles of contract existed before the nineteenth century. To understand this one must consider the interaction of the factors relevant to legal change in the relevant historical context.

and one is *compelled* to evaluate these alternatives, taking some axiological system as the starting point, even if no one can say that there exists one and only one consequent value-system of the legal order. Furthermore, the intentions of groups should not be defined in such a manner that one only considers those goals embodied in the historical sources. Constructed, hypothetical models are also needed, otherwise one may lose sight of probable motives of action which are not explicitly alluded to in the sources.

Let us now return to our earlier question: is it possible to construct a general theory of legal change? Watson declares that, even if an examination of the various factors reveals such a diversity of possibilities that a general theory could not be developed regarding the growth of law in the West (except perhaps on such an obvious, banal level), a theory should be admissible so far as it is accepted that it is possible to trace a *pattern of development*. Consider, for example, the phenomenon of codification. Since the eighteenth century codification has emerged as almost an inevitability in Civil law countries, but it has been a relative rarity in the Common law world. According to Watson, this pattern cannot be explained on the basis of unrelated facts existing in the different countries. Elucidating codification (why it occurred at all and in a particular country at a specific time and not earlier; why the code was either a new creation or adopted from elsewhere; and, if the latter, why the particular model was chosen), or its absence in certain systems, would presuppose consideration of the general factors at work when legal change occurs. It is important to note that a general theory of legal change would be *inductive*: if all situations of legal change are considered, then some general conclusions may be drawn. But such a theory would only be *nominally* general: in reality, it would include several different relations of events. However, there are some generally valid interconnections between different matters. The expression of these interconnections may be facilitated by 'historical laws', but these laws are not obligatory. They are only 'topical norms' in the form of: 'if N exists then F will happen, unless...'. One should distinguish between questions of form and questions of content. It is possible to construct a set of forms with the purpose of explaining a matter. If the validity of the theory is defined in such a manner that it depends on the relevance of the forms, it is possible to construct a theory of legal change. But this is primarily a conceptual exercise: it has nothing or very little to say about the contents of the concepts. The bulk of the theory would then consist of statements concerning *possible interactions* between the conceptually arranged matters and statements concerning working hypotheses on these relationships of interaction.

Conclusion

The uses of comparative law may be manifold, but its connection with legal theory is also important. Propositions of legal theory can be tested on the grounds of comparative material, for there exists a dialectical relationship between theory and practice that extends beyond the narrow limits of a single legal order–indeed, most legal theorists seem to assume a deductive universality of analysis. This process involves consideration of juristic forms that are not incidental or particular to the relevant case: they stem from the history of legal doctrines and ideas. We may assert that whether we proceed from forms or from contents, the choices of subjects are not purely empiric al; axiological and teleological choices must be considered and examined together with the doctrinal history of legal concepts and their systematical treatment. We can thus declare that comparative law proceeds from the following two assumptions: *(a)* law is not only a manifestation of free will but is also socially established; one cannot compare legal regulations on a purely formal basis; *(b)* law stems from social relations, but it cannot be entirely reduced to them; otherwise, one should not compare law at all but only the basic factors the law expresses. The existence of certain similar social relationships does not constitute a sufficient condition for comparison–comparative law is not merely comparative sociology. A conceptual framework is also needed. If the reductionistic standpoint is rejected, one is justified in seeking the development of general idealistic theories of legal change. It is at least reasonable to hope that such theories will enhance insights into the nature and development of law–insights that cannot be acquired in any other way.

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ÁKOS DOMAHIDI *

The Legal Position of Framework Decisions

Abstract. The framework decisions, as the central legal act under the "third pillar" are some of the most significant non-typical documents from a dogmatic point of view within the EU law. The differences and specialities of this legislative act, correlated with the EC Treaty are available not only in the lawmaking process, but in juridical supervision as well. The main goal of this paper is to show the dogmatic and practical aspects of these two perspectives. First of all it is necessary to predict, why the framework decisions are not products of classic public international law (according to the position of the German Federal Constitutional Court), rather than special documents, and do they consequently belong to a supranational system. The missing infringement procedure within the police and judicial cooperation in criminal matters makes the judicial control of the Member State's effective enlargement extremely difficult. Secondly it is important to demonstrate the alternative methods of the ECJ, which is based on case law from the Court of Luxembourg, in the field of the directives. In this context the study will analyze the consequences of the important "Pupino" Judgment.

Keywords: third pillar, EC Treaty, framework decision, ECJ

Introduction

The free movement of persons, and the fall of the physical borders within the EU caused a harmonization needs in the field of the judicial cooperation.[1] In the matter of these the position of the criminal matter has been converted, from a field as a part of the Member State's sovereignty to a flexible cooperation based on a common interest.[2]

* PhD candidate, Georg-August University Goettingen, Institute for Public International Law and EU Law. I am grateful to DAAD supporting my PhD studies. I am grateful to participants of the CHALLENGE Third Training School 2007 for their comments on a yet earlier draft of this article, particularly to Judit Tóth (University Szeged) and Florian Geyer (CEPS).
E-mail:akos@domahidi.eu

[1] Huseman, R. C.: Die Beeinflussung des deutschen Wirtschaftsrechts durch Rahmenbeschlüsse der Europäischen Union. *Zeitschrift für Wirtschafts- und Steuerstrafrecht* (2004) 454.

[2] von Bubnoff, E.: Legislative Gestaltung des europäischen Rechtsraums und deren Umsetzung in den Mitgliedstaaten. In: Pache, E. (ed.): *Die Europäische Union – Ein Raum der Freiheit, der Sicherheit und des Rechts?* Baden-Baden, 2005. 105.

The political heart of this idea was based on the institutional revision involving the Maastricht Treaty. The variations were leading to leave the single economic perspective of the integration, and to expand it with other policies. This expansion resulted the establishing of the so called "third pillar", nowadays with the official term police and judicial cooperation in criminal matters.

The main goal of this area of EU law is to create a team work within criminal policy, which is able to guarantee the highest level of safety for peoples within the EU. The rules concerning the third pillar were created not within the usual contractual frameworks of the EC, but in the in 1992 newly launched EU Treaty. But the Member States separated with the Treaty-revision of Amsterdam the identity of the regulation and it was putting every judicial cooperation concerning the visa, the asylum, the immigration and the public matters in the deeply integrated EC Treaty.

The reasonable proof according this paper that the framework decisions left the category of the rule made by the classic international public law, but arose to the level of a supranational system, and it made the ultimate valuation of the framework decisions very difficult and controversial.[3] The obvious contrasts and specialities of this legislative act, correlated with the EC Treaty are available not only in the lawmaking process, but in the juridical supervision as well. The main goal of this paper is to remarkably present the dogmatic and functional aspects of these two attitudes, and to prove an enthusiastic proper place for the framework decisions within the EU law.

Legislation Mechanism

The procedure

The EU Treaty doesn't create a new institutional framework for the new policies introduced by the Maastricht Treaty. The EU Treaty "shall be founded on the European Communities", which has been "supplemented" by the Member States.[4] For this purpose there wasn't any need for establishing a new institutional body. The EU Treaty tried to strive towards an uniform legal system.[5] That's why the well known institutions are the key players in the Provisions on Police and Judicial Cooperation in Criminal Matters, as well.

[3] Kraus-Vonjar, M.: *Der Aufbau eines Raums der Freiheit, der Sicherheit und des Rechts in Europa.* Frankfurt a. M., 2002. 7.

[4] Article 1 sec 3 TEU.

[5] Article 3 sec 1 TEU.

The legislation procedure contains previously in its first step an attribute, which is rather an additional attribute for the public international law. The Commission's initiative monopoly, well known from the first pillar,[6] is impaired. Beside the Commission the member states won the right to purpose a subject for a framework decision.[7] Before the reconciliation within the European Council a discussion is taking place in the supporting bodies under the Council, which consisted of officials delegated by the Member States.[8] After it a coordination panel[9] deals with the draft to clear legal questions elaborated by the supporting bodies under the Council.

It is a legitimate question, how the role of the European Parliament looks like. The maximum contribution of the European Parliament is limited under the legislation procedure to the consultation.[10] It is statutory for the Member States to carry out the consultation procedure, otherwise the ECJ void the framework decision due to a formal injury. [11] However to follow the relevant opinion of the European Parliament is absolutely not binding for the Council. This weak role of the European Parliament shows the problem of the democracy deficit within the third pillar.

The Council makes the final decision about the framework decision with acting unanimously.[12] The sensitive character of the regulation field and the criminal sovereignty of states purposely avoided establishing a qualified majority decision within the third pillar. To acting unanimously needs a higher level of cooperation from the part of the Member States. The Members of the Commission are entitled only to be present at the debate.[13] This clearly reflects that the main decision power is in the hand of the Member States.[14]

[6] Article 251 TEC.
[7] Article 34 sec 2 TEU.
[8] Huseman: *op. cit.* 448.
[9] Article 41 sec 1 TEU.
[10] Article 39 sec 1 TEU.
[11] Case 138/79 *Roquette Frères* [1980] *European Court Reports* 3333, para. 33.
[12] Article 34 sec 2 TEU.
[13] Article 36 sec 2 TEU.
[14] Müller-Graf, P.–C.: Europäische Zusammenarbeit in den Bereichen Justiz und Inneres. In: Müller-Graf, P.–C. (ed.): *Europäische Zusammenarbeit in den Bereichen Justiz und Inneres*. Baden-Baden, 1996. 32.

The distinguishing nature of the Member State's obligation generated by the framework decision

The result of the legislation procedure is the framework decision, which causes a real obligation for the Member States. According the Treaty "the framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and method". It means, Member States can choose free the tools from the constitutional instruments, which are suitable for an effective implementation, but the implementation itself is obligatory. To achieve an effective implementation, the Member States should concentrate to the central task set up by the framework decision. Therefore the freedom of the Member States is limited to the "effet utile" of the judicial rule. This result focused mentality of the ECJ means not only a positive legislative action from the part of the Member States, but a negative as well. A negative action basically causes in this context on the one hand the avoidance of recent legislation actions being not coherent with the main task of the framework decisions, and on the other hand annulment of former inconsistent law.

Juridical Control

After representing the specialities of the legislative procedure the study deals with the modified juridical control within the third pillar. With the Treaty of Amsterdam won the ECJ a stronger competence within the third pillar, but in a comparison with the Community law it is still poor. The competence of the ECJ is defined by Article 46 EU. However this Article doesn't create the real competence, just points out Article 35 EU. Thereby the ECJ's jurisdiction in the third pillar is limited to processes described Article 35 EU.

Preliminary rulings

The rules about the preliminary decision contain specialities compared with the procedures described in 234 EC. The formal divergence is recognizable in the double competence ruling. Firstly, the Member States can declare the competence of the ECJ concerning this particular procedure at all.[15] If the competence is given, secondly the Member States can decide which Courts can take part in the procedure. There are two alternatives. The Member States can

[15] Article 35 sec 2 TEU.

actively enable to any courts or tribunals, or just for those, whose decisions there is no judicial remedy under national law, to request the Court of Justice to give a preliminary ruling on a question rose in a case pending before it.[16] To make any restriction involving the subject of questions is not possible.[17] It is also not possible to recall the declaration made by the Member States.[18]

The interpretation of the Articles describing this special juridical procedure by the ECJ is an interesting academic question. The Treaty allowed just the interpretation of legal documents based on these articles of the Treaty, but there isn't any relevant information about the interpretation of this section of the Treaty itself.[19] The Court answered this question positively.[20]

The legality procedure

The legality procedure has also specific items. The number of the applicants is limited to the Commission and to the Member States. In this context it is missing, by contrast to the Community law, the right to apply for individuals and for the European Parliament. According to the language of the Treaty the framework decisions have no direct effect to individuals, so that's why they have also no right to complain directly against it. The underprivileged position of the European Parliament was already mentioned. The missing right to apply for individuals and for the Member States is a political symbol, which is characteristic for the inter-governmental cooperation, and not for a supranational system.

If during the legislation procedure the Parliament is not been consulted, cause a typical formal procedure failure.[21] An example for an important substance item is the correct legal basis. If the judicial review shows the Community act has an incorrect legal basis the ECJ will repeal the measure.[22] In this context it is relevant, to which pillar a legal act belongs passed by the EU, to the first or to the third?[23]

[16] Article 36 sec 3 TEU.
[17] Röben, V.: in *Grabitz/Hilf* Article 35 Rn. 10.
[18] Brechmann, W.: in *Calliess/Ruffert* Article 35 EUV Rn. 4.
[19] Borchardt, K-D.: in *Lenz/Borchardt* Article 36 Rn. 4.
[20] Case C-105/03 *Pupino* [2005] *European Court Reports* 5285, para. 37.
[21] Case 138/79 *Roquette Frères* [1980] *European Court Reports* 3333, para. 33.
[22] Case 45/86 *APS* I [1987] *European Court Reports* 1493 para. 12.
[23] Case C-170/96 [1998] *European Court Reports* 2763, para. 16.

An example: Case C-176/03 Commission vs. Council

Because of the continuous marine pollution the EU decided, to create a legal document against this special criminal offence. The Council adopted a framework decision under the third pillar. The main task of the framework decision was to control the so called "forum shopping effect", and to realize a same level of punishment for the entire offender. It is also possible to enact legal documents with criminal competence for policies under the first pillar too, if the effective implementation of this policy is just in this way realizable.[24] The ECJ created two key presuppositions for documents with criminal regulation within the first pillar. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.[25]

In contrast there is not to find any regulation concerning the environmental protection in the title IV of the TEU. On account of this, and because of the possibility to create legal acts concerning in criminal matter, the ECJ repealed the measure.[26] It is also not to forget, according to Article 47 TEU "nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them".

The missing infringement procedure

The essential difference to the juridical procedure for directives is the missing infringement procedure within the third pillar. There is no possibility to exert a direct pressure on the Member States for the sake of the complete implementation. Because of the special regulation about the legitimacy of the Court according to Article 35 TEU in combination with Article 46 TEU, the ECJ has not the right for this special procedure.

Nevertheless the infringement procedure is not the only way to protect immediately the rights of the individuals. Therefore the ECJ devised the doctrine of the direct effect of EC directives, because of the false implantation into the

[24] Case C-2/88 *Zwartweld* [1990] *European Court Re*ports 4405, para. 17.
[25] Case 68/88 [1989] *European Court Reports* 2965, para. 24.
[26] Case C-176/03 [2005] *European Court Reports* 7879, para. 51.

legal system of the Member States. However the TEU excluded obviously this option by the framework decisions.[27]

Furthermore the rule about the framework decisions has a *lex imperfecta* character. Because this weak control the alternative methods remained for the ECJ to protect the rights of the individuals. This ambitious approach was the EU framework decision conformity interpretation of the applicable national law.

The EC Directive-conformity interpretation of the applicable national law, as a dogmatically prototype

The EC-Directive conformity interpretation of the law made by the Member States as an alternative protection mechanism for the rights of the individuals was made by the ECJ and belongs since 1984 to its permanent jurisdiction.[28] According to Article 249 sec 3 there is freedom for the Member States to choose the method of the implementation of directives into the particular legal system. Pursuant to the Court this independence means just a freedom concerning the formal implementation. In the matter of that the ECJ has the right to supervise the implementation from the substantially point of view. In this context the Member States required to do any general and concrete steps for the effective implementation. The grade of the juridical supervision is the result of the implementation compared with the central task ruled by the framework decision. If the implementation by the Member States was not effective enough, the ECJ obliged the Member States to interpret directive conformity the applicable domestic law.[29] This obligation is based on the loyalty of the Member States according to Article 10 ECJ.

The imperative for the conform interpretation is definitely provided, as a special protection mechanism in favor of the individuals, if the implementation made by the Member States is unable to realize the rights regulated by the EC directive. On the other hands there is a fundamental need for the possibility of the interpretation. In this context it has to be a general possibility of interpretation within the Member State's legal order. Otherwise there is a need for the possible interpretation in the special context created by the Member State's law as well.[30]

[27] Article 34 sec 2 TEU.

[28] Case 14/83 *Colson* [1984] *European Court Reports* 1891 para. 15, Case 79/83 [1984] European Court Reports 1921, para 15.

[29] Case 14/83 *Colson* [1984] *European Court Reports* 1891 para. 26.

[30] Case 14/83 *Colson* [1984] *European Court Reports* 1891 para. 28.

Furthermore the interpretation by the Member State's Court has its own limits. The obligation on the national courts refer to the substance of the directive, when interpreting the applicable rules of its national law and is limited by the general principles of the community law, such as the principles of legal certainty and non-retroactivity of law.[31]

The obligation on the framework decisions conformity interpretation of the applicable domestic law

The form of the obligation on the directive conformity interpretation of the national law was transported to the third pillar by the ECJ.[32] This figure based on the EC-loyalty according to Article 10 TEC. However such a regulation is missing from the TEU. Nevertheless the ECJ argued that with the Maastricht Treaty was presented a new level of integration. In this context the EU developed not only concerning the number of policies, but the deepness of the integration as well. In the matter of that, it is possible to bring the juridical mechanism made by the ECJ from the area of the first pillar to the equivalent fields of the third one. Otherwise the TEU is not "a new stage in the process of creating an ever closer union among the peoples of Europe" according Article 1 sec 2 TEU.[33]

The qualification of the framework decisions as a document of the classic public international law does not make any different in this context. As Advocate General Kokott mentioned, the Member States are obligated on the directive-conformity interpretation too, if this is an instrument of the classic public international law.[34] In the matter of that, the qualification of the framework decisions as a document of the public international law is not suitable to isolate absolutely the Member State's legal order.[35]

The constitutional limitations of the obligation on the framework decisions conformity interpretation of the domestic law

It is important to point out that; the Court transported not only the figure of the obligation on the framework decisions conformity interpretation of the applicable national law, but the limits of this obligation as well.

[31] Case 80/86 *Kolpinghuis Nijmengen* [1987] *European Court Reports* 3969 para. 13.

[32] C-105/03 *Pupino*, [2005] *European Court Reports* 5285.

[33] Case C-105/03 *Pupino*, [2005] *European Court Reports* 5285, para. 42.

[34] Opinion of Advocate General Kokott, Case C-105/03 *Pupino* [2005] *European Court Reports*, 5285 para. 37.

[35] Adam M.: Die Wirkung von EU-Rahmenbeschlüssen im mitgliedstaatlichen Recht. *Europäische Zeitschrift für Wirtschaftsrecht* (2005), 560.

Firstly, it is initially prohibited to exceed the border between the so called *contra legem* judge made law and acceptable juridical interpretation. There is three main form of the juridical interpretation.[36] The first named *prater legem* basically suggests the legal text immanent interpretation, which is limited to the minor corrections or completions of the written law by judges. During the second art of interpretation named *extra legem–intra ius* the judge leaves the field of the written law, because it doesn't give a proper answer in a special question. But the judge's interpretation is staying within the law. The third category named *contra legem* means a legal interpretation against the written law, which is only allowed in a legal emergency situation.

In the matter of that, it is forbidden to realize so the interpretation of the applicable national law by the domestic court that the interpretation will be equivalent with the directive effect of the framework decisions. In other way such an interpretation a typical form of the *contra legem* interpretation,[37] because according the TEU it is absolutely prohibited the direct effect of framework decisions.[38]

Secondly, the obligation on the framework decisions conformity interpretation of the domestic law is a tool created by the ECJ to protect effectively the rights of individuals. It is also forbidden to use this protection mechanism against the individuals. Because of the special character of the framework decisions, as a rule in the field of the criminal matters, such a constitutional restriction is very important. So any interpretation is forbidden in the third pillar too, which creates a criminal responsibility or makes the adjudication the position of the individuals more difficult.[39]

Thirdly, the ECJ pointed out that, the domestic courts must follow the fundamental rights of the EU, consisted of the constitutional tradition of the Member States on the one hand, and the Convention of Fundamental Rights signed in Rome 1950 on the other hand. The direct addressees of the EU's fundamental rights are the organs of the EU.[40] However the Member States are indirectly obliged to follow the EU's fundamental right as far as they apply EU law. So during the interpretation the national judge must follow not only to the

[36] Ukrow, J.: *Richterliche Rechtsfortbildung durch den EuGH*. Baden-Baden, 1995. 70.

[37] Wasmeier, M.: Der Europäische Haftbefehl vor dem Bundesverfassungsgericht. *Zeitschrift für Europäische Studien* (2006) 5.

[38] Article 34 sec 2 b.

[39] Case C-105/03 *Pupino* [2005] *European Court Reports* 5285, para. 45.

[40] Article 6 sec 2 TEU.

conformity with the framework decisions, but must follow at the same time the fundamental rights of the EU.[41]

The protection of the individual rights: alternative methods

The direct effect of the framework decisions as an alternative mechanism protecting the individual rights is missing under the third pillar. Furthermore the infringement procedure is also missing, as an indirect possibility to protect the rights of the individuals. So the one possibility to put pressure on the Member States due to the effective implementation of the framework decisions is the obligation on the framework decisions conformity interpretation of the national law created by the ECJ. However there is another protection mechanism according the case law, the liability of the State for loss and damage resulting from breach of its obligations under EU law.[42]

The liability of the State for loss and damage resulting from breach of its obligations under EU law was created by the ECJ because of the following reasons. Firstly, the direct effect of directives was ineligible due to exist of the legal relationship between individuals. The directives create a legal obligation just for the Member States, so a horizontal direct effect of directives is prohibited.[43] Secondly, the infringement procedure was also not able to protect the right of the individuals, because the directive was not implemented, however the deadline for the implementation ended more years ago.

It has been consistently held that the national courts, whose task is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals.[44] The obligation of Member States to make good such loss and damage is based on Article 10 of the EC Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under Community law.[45]

So if the infringement procedure is missing, the direct effect is forbidden according the Treaty, it is allowed any other mechanisms to secure the protection

[41] Egger A.: Die Bindung der Mitgliedstaaten an die Grundrechte in der III. Säule. *Europäische Zeitschrift für Wirtschaftsrecht* (2005), 665.

[42] Case 6/90 *Francovich* [1991] *European Court Reports* 5357.

[43] Case C-188/89 *Marshal* [1990] *European Court Reports* 3313, para. 47.

[44] Case 106/77 *Simmenthal* [1978] *European Court Reports* 629, para. 16, and Case C-213/89 *Factortame* [1990] ECR I-2433, para. 19.

[45] Case 6/90 *Francovich* [1991] European Court Reports 5357, para. 36.

of individual's rights. In this context the ECJ transported on the "bridge", set up between EC directives and EU framework decisions with the Pupino Case, the obligation of the framework decision conformity interpretation of the domestic law. Nevertheless it seems well possible to transport the liability of the State for loss and damage resulting from breach of its obligations under EU law as well. However the state loyalty according to Article 10 EC is missing under the third pillar,[46] in a hypothetical case where the protection of individuals and the realization of the EU law's effectiveness with other ways not possible, the ECJ will introduce the state responsibility in the field of the criminal matters as well.

The state liability has also additional criteria, which must be fulfilled. Firstly, the result prescribed by the directive should entail the grant of rights to individuals. Secondlym, it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.[47]

The Legal Position of the Framework Decisions

After presenting the special regulation in the area of the legislation and juridical supervision of the framework decisions by contrast to the directives, as a typical legal act within the first pillar, the study will focus to the legal position of it. The main question in this area is to find the right position of the framework decisions between a legal act made by the classic international law, and a supranational legal act.

Cyber crime Convention of the Council of Europe vs. Framework decision

To point out the differences between documents that belonged to the classic public international law, and a framework decision, there is a need to compare it from the analytical point of view. In the matter of that the research tries to compare two documents made in the same subject, but one is a Convention under the classic public international law, and the other is a framework decision.

[46] In the case Pupino was the missing of Article 10 EC not enough to avoid the European Court of Justice to introduce the obligation on the framework decisions conformity interpretation of the national law.

[47] Case 6/90 *Francovich* [1991] European Court Reports 5357, para. 40.

The Convention was purposely created sooner, so several Member States regarded an own ruling within the EU as unnecessary.[48] However the Council stayed by the original idea to make an own EU ruling.[49]

There is not to find a difference in the terminology of the two documents.[50] The differences are available on the one hand in the perspectives, on the other hand the above mentioned nature of the international liability of the States caused by the documents.

Due to the global dimension of the cyber crimes the Council of Europe decided to make a comprehensive regulation, to stop the expansion of cyber crime without border. In this context the Convention regulated not only substance, and procedure law, but divers form of international cooperation as well.[51] In the matter of that the Convention obviously presented a real wide horizontal perspective. However in the field of the vertical perspective the Convention is limited to a general level. By contrast the framework decision is concentrated to three essential matter of fact in the horizontal level, but in the vertical perspective tries to create a precise regulation.

To understand this difference it is important to consider the other main difference, the substantive nature of the liability created by the documents. The Convention made by the Council of Europe is legally binding for states, which state ratified it. In the reason of that it was possible a really wide horizontal perspective. Currently Cyprus, Denmark, Hungary, Estonia, France, Lithuania, Romania, Netherlands and Slovenia ratified the Convention, the other 18 EU Member-States not.[52] For these 18 EU Member States the Convention is not legally bound. In contrast the legal binding by the framework decision started immediately after coming into force.

Arguments of the national constitutional courts about the legal position

In 2005 two national constitutional courts decided about national legal act, implemented the arrest warrant framework decision, and declared it incompatible with the constitution. However this study did not focus on the material aspects

[48] Sanchez-Hermonsilla F.: Neues Strafrecht für den Kampf gegen Computerkriminalität. *Computer und Recht* (2003), 778.

[49] Gercke M.: Der Rahmenbeschluss über Angriffe auf Informationssysteme. *Computer und Recht* (2005), 468.

[50] Sanchez-Hermonsilla: *op. cit.* 778.

[51] Gercke: *op. cit.* 472.

[52] Simplified Chart of signatures and ratifications is available under (Date of downloading: 13/03/2007). http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp

of the arrest warrant framework decision, the decisions of the national constitutional courts include key aspects concerning the legal position of the framework decisions.

The German Federal Constitutional Court (BVerfG) surprisingly pointed out that, the legal characteristic of the third pillar is a simply intergovernmental cooperation,[53] and the area belongs despite of the development to the public international law.[54] Firstly, the decision procedure based according to the BVerfG on consensus, as representing a typical character for decision making within the intergovernmental cooperation. Secondly, the active participation of the European Parliament within the legislation procedure is limited to the consultation. However these two involved characteristics are available in the decision making within the supranational first pillar as well.[55] Meanwhile last the persuasive argument supported by the BVerfG is applicable, which pointed out the missing juridical supervision the implementation actions of the framework decisions made by the Member States. Nevertheless this single argument makes the arrangement of framework decisions to act of the classic international law not clear.[56] The Polish Constitutional Tribunal's decision has the same opinion concerning the legal position of the framework decisions. According to the Tribunal this measure has the nature of a regular international agreement, as a result of cooperation between the Member States.[57]

However the conclusion of these two decisions made by national constitutional courts was the same, the reaction of the national legal orders was absolutely different. In Germany the legislator designed a new national legal act to implement the arrest warrant framework decision considering the criteria of the compatibility with the German Constitution pointed out by the German Federal Constitutional Court. However this criterion does not strictly fulfill the anti-discriminating regulation of the EU.[58] By contrast the President of the Republic of Poland introduced a bill to the Marshal of the Sejm proposing to change the constitution.[59] As a result of this change of the Polish Constitution now it fulfills now the criteria of the compatibility with the arrest warrant framework decision. With other words expressed, Germany purposely made a

[53] *Bundesverfassungsgerichts* Decision 18. 07. 2005. para. 73.

[54] *Ibid.* para. 81.

[55] For example: Articles 61, 93, 175 sec 2, 308 TEC.

[56] Wasmeier: *op. cit.* 28.

[57] Leczykiewicz, D.: Note to the Trybunal Konstytucyjny (Polish Constitutional Tribunal), Judgment of 27 April 2005, *Common Market Law Review* (2006) 1183.

[58] Reinhardt J./Düsterhaus D.: Verfassungsgemäß, aber gemeinschaftswidrig. *Neue Zeitschrift für Vervaltungsrecht* (2006) 432.

[59] Leczykiewicz: *op. cit.* 1191.

new regulation which is now compatible with the German Constitution, and not consistent with the EU law, nevertheless Poland has changed the own Constitution to make it compatible with the arrest warrant framework decision.

Conclusion

The framework decisions, as the central legal act under the "third pillar" are some of the most significant non-typical documents from a dogmatic point of view, within the EU law. The obvious contrasts and specialties of this legislative act, correlated with the EC Treaty are available not only in the lawmaking process, but in juridical supervision as well.

The legislation procedure is different from conventional form of the law-making under the supranational law. However there are examples within the first pillar, where the main decisions form is to acting unanimously and the participation of the European Parliament is limited to the consultation.[60] Framework decisions are not document of classic public international law (according to the position of the German Federal Constitutional Court), and they consequently do belong to a supranational system.

The main argument, beside the qualification of these legal acts in the Constitutional Treaty, the existing legal "bridge" set up between EC directives and EU framework decisions made by the ECJ. On this connection was so far transported the obligation of the framework decision conform interpretation of the national law. However the establishment of state liability by the ECJ within the criminal matters is not to be prohibited. This method is not only a possibility to protect the rights of the individuals, but also a method to exert a pressure on the Member States due to an effective implementation.

[60] For example: Articles 61, 93, 175 sec 2, 308 EC.

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CSONGOR ISTVÁN NAGY*

The Moral of the Hungarian Status Law Saga

Abstract. The present paper deals with the debate about the fiercely disputed Hungarian Status Law and its amendments. The Law was destined to grant a special status to ethnic Hungarians living the beyond the borders of Hungary. The paper contains a brief comparison of the mainly Central and Eastern European laws, through which states grant special rights to their kin-minorities. The international debate about the Hungarian Status Law is also covered by the paper. Even though several states grant special status to the members of their kin-minorities the enactment of the Hungarian Status Law triggered a surprisingly fierce debate. It is submitted that although in some details the law might have run counter certain public international law principles, the reaction to the law was mainly backed by emotional arguments and hence the whole controversy could not go beyond the level of symbols. The paper also deals with the 2003 amendment of the Law, which was enacted according to the objections raised by the neighbouring countries. The paper is an attempt to show the futility of the whole Status Law debate: it is submitted that although the 2003 amendment did not go into the very substance of the provisions of the Law at large, it did satisfy these claims by simply changing the phraseology of the Law.

Keywords: discrimination based on ethnic origin, kin-state regulation of minorities, extraterritoriality, minority law, minority protection, status law

I. Introduction

One of the fiercest foreign policy debates within the Carpathian Basin was the controversy related to the so-called Hungarian Status Law.[1] Namely, the Hungarian government enacted a legislation granting special entitlements to ethnic Hungarians living in the neighbouring countries. The Law was blamed, *inter alia*, for having extraterritorial effect and being discriminatory. Following numerous negotiations and mediations held by international institutions, the Status Law was amended and brought in conformity with these political claims.[2]

* LLM SJD student, Central European University, Budapest/New York.
E-mail: csongor.nagy@gmail.com

[1] Act No. LXII of 2001 on Hungarians living in neighbouring countries. *International Legal Materials* (2001) 1242.

[2] Act No. LVII of 2003 amending Act No. LXII of 2001 on Hungarians living in neighbouring countries.

The significance of the above is twofold. First, after the foreign policy dispute clamed down and the application of the Status Law has earned some experience it is worth to draw some conclusions and to find the moral of the whole controversy. Second, although the foreign policy dispute is over, the issue is far from losing its significance. On December 5, 2004 a referendum was held in Hungary on whether non-citizen ethnic Hungarians should be granted Hungarian citizenship, i.e. should ethnic Hungarians of foreign citizenship acquire Hungarian citizenship automatically but upon request without requiring some years of permanent residence in Hungary. Although the referendum–due to the low level of participation–failed, a slight majority of the citizens who expressed their wills opted for granting citizenship to the kin-minorities. Even though the Hungarian society is divided regarding the above issue, it must be observed that there is political support for a strong policy towards Hungarian minorities living abroad.

In this paper I try to show the futility of the debate about the Status Law, which could not touch on any relevant points of the issue. Some neighbouring countries felt that the Status Law is the legislative annexation to Hungary of their citizens of Hungarian origin what is unintelligible given the fact that the Law did not create a previously unknown legal regime and some of the neighbouring countries have roughly similar laws.[3] This might be explicable with the fact that Hungarians represent a considerable proportion of the population in these countries.[4] Hence, in the first part of this paper I deal with the general features of the status laws and the issues they normally cover. Such a comparative perspective is of utmost importance as the Status Law saga was not the first legislation of this kind. Several states preceded Hungary in enacting laws on their kin-minorities. Second, I analyze the Hungarian Status Law, especially those parts of it that triggered fierce objection. Finally, I examine the international instruments dealing with the status laws.

[3] Stewart, M.: The Hungarian Status Law. A new European form of Transnational politics? *WPTC*-02-09. London, 2002. 15–16.

[4] Note that approximately every fourth Hungarian is living beyond the borders of Hungary. Approximately 1,5 million ethnic Hungarians are living in Romania (census of 2002), 522 thousand in Slovakia (census of 2001), 150 thousand in Ukraine (census of 2001), 300 thousand in Serbia-Montenegro (estimations of the Yugoslav Federal Office of Statistics for the year 2001). See Halász, I.–Majtényi, B.–Vizi, B.: A New Regime of Minority Protection? Preferential Treatment of Kin-minorities under National and International Law. In: Kántor, Z.–Majtényi, B.–Ieda, O.–Vizi, B.–Halász, I. (ed.): *The Hungarian Status Law: Nation Building and/or Minority Protection.* 21st Century COE Program Slavic Eurasian Studies, 2004. 349.

2. Status Laws in Europe

Several states have a certain permanent policy towards their kin-minorities. A lot of them, however, have not adopted any legislation in this regard and their actions consist mainly of administrative programs or practice, e.g. Germany.[5] A considerable part of those that have a special law for this purpose provided this law with vague phrases defining only some program settings and priorities. There are, however, several laws that grant a special status for their kin-minorities which encompasses the enjoyment of particular entitlements. The most important issues in this respect are the following: who can gain such a status, how and what kind of certificates are issued for that end and what entitlements does the special status embrace?

The most important condition of such a special status is the requirement of belonging to a particular kin-minority group, i.e. being of certain ethnic origin. For instance, the Bulgarian act requires Bulgarian ancestors and national conscience.[6] The Slovak act speaks only about Slovak ethnic origin and linguistic-cultural conscience.[7] The Austrian act requires that the person demanding the special status be born in South Tyrol and have declared himself as a member of the German language minority. If he/she was not born in South Tyrol, it is required that at least one of his/her parents be a native German speaker.[8] The Greek law also covers the relatives of ethnic Greeks.[9]

Almost all laws require a constitutive act of the kin-state in order to gain the special status. However, the Austrian act covers Germans in South Tyrol *ex lege*.[10] The Bulgarian act provides for a hybrid solution. It prescribes that Bulgarian origin may be proven through documents issued by Bulgarian or

[5] Gyertyánfy, A.: A határon túli németek jogállása a magyar Schengen-probléma tükrében (The legal status of the Germans beyond the borders in the light of the Hungarian Schengen-problem), *Regio* 11 (2000) 140. See Halász–Majtényi–Vizi: *op. cit.* 335.

[6] See Article 2 of the Law on the Bulgarians living outside the Republic of Bulgaria *State Gazette* (2000) 30.

[7] See Article 2 (2)–(3) and (6) of Act No 70 of February 14, 1997 on Expatriate Slovaks and changing and complementing some laws. (1997) http://www.gszs.sk/zakon70en.php January 23, 2005.

[8] See Article 1 of the Federal Law of 25 January 1979 on the equation of South Tyroleans with Austrian citizens in certain administrative areas. *Bundesgesetzblatt* (1979) 57.

[9] See Article 1 (2) of the Joint Ministerial Decision no. 4000/3/10/e of the Ministers of the Interior, of Defence, of Foreign Affairs, of Labor and of Public Order of 15–29 April 1998 on the Conditions, Duration and Procedure for the delivery of a Special Identity Card to Albanian citizens of Greek origin.

[10] *Ibid.* Article 1.

foreign state institutions, accredited organizations and the Bulgarian Orthodox Church.[11]

The certificate issued for this purpose varies from country to country. Most of them are issued only for the purpose of the enjoyment of the entitlements and they do not replace the identity card or the passport of the state of citizenship.[12] An exception is the Greek law that prescribes that the certificate is a special identity card.[13] Generally, the certificates are issued by the administrative organs of the kin-states including diplomatic and consular missions. The involvement of civil institutions in this process is not generally accepted but there are some exceptions. Regarding Bulgaria, the certificate may be actually issued by the Bulgarian Orthodox Church. The existence of Greek origin was previously investigated by the Greek Association of North Epiros. Now this function is fulfilled by Greek consulates.[14] The Slovak law prescribes that Slovak origin and national conscience are to be proven through public deeds, however, if that is not possible, the applicant is allowed to submit the certification of the kin-organization of his place of residence or the certification of two Slovaks living in the same country as the applicant.[15]

The gist of the special status granted to the members of kin-minorities relies in the bundle of rights it contains. These rights or entitlements are to be divided into three groups: migration rights or visa, cultural and economic rights. Almost all laws deal with the issue of visa and residence permit. Some of them facilitate the acquisition of these permissions (Bulgaria[16]); some other laws provide that the certificate is itself a visa (Austria,[17] Slovakia[18]) or a residence permit (Greece[19]).

The spectrum of cultural and educational rights embraces the right to access the scientific and cultural life of the kin-state, the right to be admitted to the state education system, the right to be an ordinary member of the respective national academy of science etc.[20] Virtually all laws provide that

[11] See Bulgarian law, *op. cit.* Article 3.

[12] See Article 3 (1)–(2) of the Federal Law on the State policy of the Russian Federation in respect of the compatriots abroad (1999).

[13] See Greek Regulation, *op. cit.* Article 1.

[14] *Ibid.* Article 2.

[15] See Slovak law, *op. cit.* Article 2(4)–(5) and (7).

[16] See Bulgarian law, *op. cit.* Article 7 and 15.

[17] See Austrian law, *op. cit.* Article 5.

[18] See Slovak law, *op. cit.* Article 5.

[19] See Greek Regulation, *op. cit.* Article 3.

[20] See Russian law, *op. cit.* Article 17; Bulgarian law, *op. cit.* Article 9–10; Slovak law, *op. cit.* Article 6.

members of kin-minorities shall be entitled to access the education system of the kin-state, differences lie, though, in the level of education they provide access to. The Bulgarian act provides that ethnic Bulgarians shall have unrestricted access to primary and secondary schools, while regarding universities according to the quotas specified by the government, annually.[21] In Russia, Slovakia and Austria the members of kin-minorities are admitted unrestrictedly to all levels of education.[22] The Bulgarian and Romanian laws prescribe the provision of scholarships to persons studying in their kin-state.[23]

Some laws provide certain economic and financial rights, as well. The most important of these is the acquisition of a work permit. The Greek and Slovak certificates substitute the work permit, thus their holders are entitled to work in Greece and Slovakia, respectively, without any further formality.[24] The Bulgarian law provides for an expeditious procedure.[25] Other entitlements encompass, *inter alia*, discounts for public transportation for retired persons,[26] acquisition of real estates according to special provisions[27] etc.

3. The Hungarian Status Law

The Hungarian Status Law applies to persons declaring themselves to be of Hungarian ethnic origin.[28] According to the original version of the Law, the Hungarian certificates were issued by Hungarian state institutions, however, the law provided that these authorities shall issue the certificate "if the applicant is in possession of a recommendation which has been issued by a recommending organization representing the Hungarian national community in the neighbouring country concerned, and being recognized by the Government of the Republic of Hungary as a recommending organization."[29]

[21] See Bulgarian law, *op. cit.* Article 9–10.

[22] See Russian law, *op. cit.* Article 17 (6); Slovak law, *op. cit.* Article 6 (1)(a); Austrian law, *op. cit.* Article 4 (3).

[23] See Bulgarian law, *op. cit.* Article 10 (3); Article 7 and 9 of the Law regarding the support granted to the Romanian communities from all over the world (1998) *Monitorul Oficial al României*, 124.

[24] See Greek Regulation, *op. cit.* Article 3; Slovak law, *op. cit.* Article 6 (1)(b).

[25] See Bulgarian law, *op. cit.* Article 7.

[26] See Slovak law, *op. cit.* Article 6 (3).

[27] See *ibid.* Article 6 (2).

[28] See Hungarian Status Law, *op. cit.* Article 1 (1).

[29] See Hungarian Status Law, *op. cit.* Article 20 (1).

The Hungarian Status Law lacks several of the rights ordinarily provided by the laws of the same kind. It does not substitute for a visa or a residence permit, nor does it facilitate the issuance of them. However, it provides for entitlements beyond the above. For example, an ethnic Hungarian bringing up at least two children of minor age in his/her own household is entitled to educational assistance for each of his/her children if the child attended an education institution according to his/her age and received training or education in Hungarian. Finally, the original version of the Hungarian Law provided that "work permits shall be issued under the general provisions on the authorization of employment of foreign nationals in Hungary, with the exception that the work permit can be issued for a maximum of three months per calendar year without the prior assessment of the situation in the labour market".[30] Namely, the Hungarian authority was required to assess the situation in the labour market prior to issuing a work permit to a foreign citizen. The Law eliminated this requirement; however, all other conditions were to be fulfilled by Hungarian applicants.

In 2003, the Law was profoundly amended due to the vehement opposition of some of the neighbouring countries.[31] The amending act mainly followed the legal position of the relevant international institutions.

4. Public International Law Evaluation and the Amendments to the Hungarian Status Law

The rules of public international law regarding status laws were interpreted by several international institutions. However, most of these declarations were rather foreign policy documents worrying about the stability of the region than real legal analyses, advising further deliberations and supporting any solution that may be agreed by all the interested parties.[32] There were, nonetheless, some documents of legal interest. The most important of these is the

[30] See Hungarian Status Law, *op. cit.* Article 15.

[31] The 2003 Amendment of the Hungarian Status Law, *op. cit.*

[32] See Warner, E.: Unilateral preferences granted to foreign national minorities by a kin-state: a case-study of Hungary's "status law", *Georgetown Journal of International Law* 35 (2004) 379, 430.

Report of the Venice Commission.[33] Less significant, but still important, is the resolution of the Council of Europe and its *travaux préparatoire*.[34]

These legal opinions did not question the legal basis of the status laws; nonetheless, they criticized some points of the Hungarian Law, which were later on amended according to these remarks. The respective resolution of the Council of Europe even welcomed, in principle, the "assistance given by kin-states to their kin-minorities in other states in order to help these kin-minorities to (sic!) preserve their cultural, linguistic and ethnic identity".[35] The main objection against the Law was its allegedly unilateral approach, which was criticized by the neighbouring countries.[36] However, the resolution objected to the phraseology of the Law in one regard: it found that "there is a feeling that in [the] neighbouring countries the definition of the concept of 'nation' in the preamble to the law could under certain circumstances be interpreted–though this interpretation is not correct–as non-acceptance of the state borders which divide the members of the 'nation', notwithstanding the fact that Hungary has ratified several multi- and bilateral instruments containing the principle of respect for the territorial integrity of states, in particular the basic treaties which have entered into force between Hungary and Romania and Slovakia." As a consequence, Hungary banished this expression from the Law.[37] Notwithstanding the disputed linguistic meaning of the word "nation", i.e. whether it is the natural equivalent of territorial demands or not, this objection seems to be much more artificial than real. By the same token, this phrase had no practical effects and it was only a legerdemain with words. The Hungarian government did not insist on this expression and amended the law,

[33] http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp

[34] See Resolution 1335 (2003). Preferential treatment of national minorities by the kin-state: the case of the Hungarian Law on Hungarians Living in Neighboring Countries ("Magyars") of 19 June 2001 http://assembly.coe.int/Documents/AdoptedText/TA03/ERES1335.htm January 23, 2005; Report of the Committee on Legal Affairs and Human Rights. Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group. Doc. 9744 rev. May 13, 2003. See http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9744.htm (February 20, 2005); Opinion of the Political Affairs Committee. Rapporteur: Mr Latchezar Toshev, Bulgaria, Group of the European People's Party. Doc. 9813. May 22, 2003. See http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9813.htm (February 20, 2005).

[35] See art 1 of Resolution 1335 (2003). Preferential treatment of national minorities by the kin-state: the case of the Hungarian Law on Hungarians Living in Neighboring Countries („Magyars") of 19 June 2001. See http://assembly.coe.int/Documents/AdoptedText/TA03/ERES1335.htm January 23, 2005.

[36] *Ibid.* Article 9.

[37] Halász–Majtényi–Vizi: *op. cit.* at 338.

accordingly. However, the question still emerges: how can an expression with no normative meaning included into a Hungarian law–stating that ethnic Hungarians are part of the Hungarian nation–violate the sovereignty of other states?[38]

Another objection of similar nature and psychology was that Hungarian certificates founded a public law or political relationship between their holders and Hungary. The Venice Commission, reacting to this criticism, held that "an administrative document issued by the kin-State may only certify the entitlement of its bearer to the benefits provided for under the applicable laws and regulations". It is not a surprise that in its conclusions the Commission used a positive definition in this regard, i.e. "may only certify", instead of a negative one, i.e. "shall not", since the concept of a unilateral act creating a political or public law relationship with foreign citizens has no sense at all. The relationship between the state and the foreign citizen consists in the rights and entitlements secured by the law; so the certificate can be objected only if the rights embodied into it can be criticized. The objections seem to originate better from the chronic fear of secession than from any actual legally meaningful rule. The consequence of this fierce protest was that a phrase was inserted into the Law declaring expressly that the certificates served only for administrative purposes and nothing more. This makes no actual difference, since the certificates were not susceptible of proving anything more than the entitlements to the benefits and they were not susceptible of identifying their holders, either.[39] That was the wisest reaction, though it is worth emphasizing that the Greek certificate is manifestly an identity card and the Slovak one is confusingly similar to the Slovak ID.[40]

One of the main objections against the Hungarian Status Law, especially the issuance of the certificates concerned, was that they were to be provided upon the recommendation of an accredited organization of the kin-minority in the country concerned. The Venice Commission found that this is a quasi-official function and "no quasi-official function may be assigned by a State to non-governmental associations registered in another State. Any form of certification *in situ* should be obtained through the consular authorities within the limits of

[38] See Stewart: *op. cit.* at 25–26.

[39] See Warner: *op. cit.* at 422.

[40] Memorandum: Legal Analysis of the Slovak Rebublic's Comments to the Amendments to the Law on Hungarians Living in Neighbouring Countries. Center for Legal Analyses-Kalligram Foundation. 2002. (http://kbdesign.sk/cla/projects/project.php?melyik=comparative_statuslaw&nyelv=en&direkturl=comparative_statuslaw/cla_analysis/cla_memorandum_on_status_law.htm)

their commonly accepted attributions". Even though the involvement of local minority organizations is not new in this field, the Venice Commission held that contrary to the Bulgarian and Slovak laws, the Hungarian law does not define the criteria of Hungarian origin, thus the civil organization empowered to issue the recommendation has actually unlimited discretion in this respect. The Commission held that "the laws or regulations in question should preferably list the exact criteria for falling within their scope of application. Associations could provide information concerning these criteria in the absence of formal supporting documents." This reasoning, or rather this comparison, is far from convincing.

First, "the recommending organizations would not have had any authority to take any action that would be binding on the Hungarian government, nor would they have acted on instructions from the Hungarian government. Recommending organizations would not have had the authority to award Certificates, confer benefits under the Status Law, or interpret its provisions".[41] Second, the terms of the laws used by the Venice Commission as reference define their addressees using vague terms that cannot be considered to have any palpable meaning. E.g. a person has Slovak ethnic origin if he/she is an ethnic Slovak or he/she has a Slovak ancestor up to the third generation,[42] the Bulgarian law covers persons having at least one Bulgarian ancestor and Bulgarian national conscience.[43] Even if accepting that these laws establish clear-cut rules, e.g. ancestors of certain origin, they do not define the content of the notions they refer to. How do we conclude that somebody, i.e. the relevant ancestor, had certain ethnic origin? At the end of the day, these definitions give a *carte blanche* to civil institutions, too. Both definitions, similarly to the Hungarian one, contain open, indefinable terms. Furthermore, one should not forget, the Bulgarian civil organizations do, *de facto*, issue the certificates in question, which is much more an official function than the issuance of recommendations. Of course, the right of the civil organizations to issue recommendations can be criticized from a legal protection point of view, since applicants have no legal remedy if the issuance of the recommendation is refused.[44] This is, however, another issue. All in all, there seems to be no striking difference between the Hungarian legislation, on the one hand, and the Bulgarian and Slovak laws, on the other.

[41] Warner: *op. cit.* at 415.

[42] See Slovak law, *op. cit.* Article 2 (2)–(3) and (6).

[43] See Bulgarian law, *op. cit.* Article 2.

[44] Küpper, H.: Hungary's Controversial Status Law. In: Kántor–Majtényi–Ieda–Vizi–Halász (ed.): *The Hungarian Status Law... op. cit.* 319.

Regarding the specific entitlements, two of them raised special opposition in the neighbouring countries. First, the positive discrimination with regard to the issuance of work permits in Hungary, which became irrelevant in the direction of those countries that became members of the European Union on May 1, 2004. Second, the assistance or support paid to parents in case their children studied in Hungarian.

The first issue was criticized on the basis of discrimination. The Venice Commission held that discrimination is not *per se* illegal, though it has to have reasonable grounds. Concerning cultural and educational rights, the discrimination on the basis of ethnic origin is justified through the targeted legitimate purpose, whilst economic rights cannot be justified with the same end, i.e. positive discrimination may be acceptable, if it is employed to achieve the end of preservation of national and cultural identity. "Preferential treatment can not be granted in fields other than education and culture, save in exceptional cases and if it is shown to pursue a legitimate aim and to be proportionate to that aim." However, a state may have several reasons to prefer persons of certain ethnic origin when issuing a work permit. If these people speak the official language, it is easier for them to contact the labour administration, they do not only have better perspectives of social integration, they even do not have to be integrated. The population of Hungary is diminishing year by year and there are considerable job vacancies in particular professions; hence, Hungary has a real interest in importing labour force and it is reasonable that it prefers ethnic Hungarians (for the language and social reasons mentioned above). It should not make a difference concerning the legal fate of the regulation whether it is included into a status law or in the labour law. What is more, preferential treatment in this regard is far from unknown. Bulgaria provides it; in Slovakia and Greece the addressees of the laws do not need a work permit and do not have to comply with any formalities.[45]

In relation to the second issue, the main objection against parental support was that it was to be paid directly to the parents, which made it extraterritorial. Now the parental support, in accordance with the respective bilateral agreements, is mostly paid through the civil organizations of the kin-minority.[46] The reaction of the states concerned suggests that they consider this practice of indirect

[45] Bulgarian law, *op. cit.* Article 7; Slovak law, *op. cit.* Article 6 (1)(b); Greek Regulation, *op. cit.* Article 3. See Halász–Majtényi–Vizi: *op. cit.* at 341.

[46] See The 2003 Amendment of the Hungarian Status Law, *op. cit.* Article 21; Gyertyánfy: *op. cit.* at 347.

payment acceptable from a public international law point of view. At the end, does it make a difference?[47]

As regards the objections to the parental support it cannot be disregarded that "the principle of extraterritoriality is clearly limited to the situation of a state exercising its laws and powers on the territory of another state. Awarding a prize, a scholarship or financial assistance for the study of a country's language or culture does not involve any application of a law or power on the territory of another state".[48] "The Status Law does not assert any right to regulate or proscribe the conduct or behaviour of kin-minorities; the benefits under the Status Law are entirely optional. A more appropriate way of looking at the relationships established by the Status Law would be to view them as essentially contractual in nature, the result of acceptance by a qualified beneficiary of a conditional offer made by the government of Hungary, rather than as an exercise of governmental authority."[49]

5. Conclusions

The moral of the whole saga is nothing less than the complete failure of minority protection in national as well as in international law, which is the result of the obsolete concepts of national state and the political actors' incapability of dealing with the merits of the problem instead of struggling on the level of symbols. "Many of the arguments made against the Status Law were more political and emotional rather than legal in nature, and also somewhat disingenuous, coming from states that have adopted similar laws with respect to their own kin-minorities."[50] It is not welcomed that states feel forced to have recourse to such unilateral instruments in order to protect their kin-minorities. If there were a workable minority protection regime, there would be no domestic political support for such status laws. States are not ethnically neutral and this raises serious problems in countries where the population is not ethnically

[47] See Küpper: *op. cit.* at 324.

[48] De Varennes, F.: An Analysis of the 'Act on Hungarians Living in Neighbouring Countries' and the Validity of Measures Protecting and Promoting the Culture and Identity of Minorities Outside Hungary. In: Kántor–Majtényi–Ieda–Vizi–Halász (ed.): *The Hungarian Status Law... op. cit.* 414; See Varga, A.: Legislative Aspects and Political Excuses: Hungarian–Romanian Disagreements on the 'Act on Hungarians Living in Neighbouring Countries'. In: Kántor–Majtényi–Ieda–Vizi–Halász (ed.): *The Hungarian Status Law... op. cit.* 469.

[49] See Warner: *op. cit.* at 416.

[50] *Ibid.* at 431.

homogeneous. For instance, the number and proportion of Hungarians in the neighbouring countries is constantly declining,[51] the playing of the Hungarian card always holds out success in the neighbouring countries etc.

Furthermore, the reflexes the neighbouring countries had to the enactment of the Hungarian Status Law are alarming, which, by the way, were absent in case of other laws. Especially the pedantry with regard to the terminology of the law was surprising and tragicomic, e.g. nation in cultural or ethnic sense, or even as a tool of hidden irredentism; certificates that create political and public law relationship with Hungary and that, hence, facilitate secession. These battles and deliberate misinterpretations at the level of symbols do not lead us closer to the solution of the problem since there is certainly a problem. That was all that fed the adoption as well the opposition of the Status Law and until now there is no workable international law regime for minority protection that could handle the issue on multilateral level. Thus states are coerced to unilateralism.

Finally, in international relations the endeavour to stability and to a situation without interstate conflicts is very welcome but this end can be achieved only in the short run if international institutions do not assist the reconcilement of ethnic conflicts–i.e. to reach a solution that is satisfactory for both parties–but they just freeze the problem.

[51] Gál, K.: The Hungarian Legislation on Hungarians Living in Neighbouring Countries. In: Kántor–Majtényi–Ieda–Vizi–Halász (ed.): *The Hungarian Status Law... op. cit.* 400.

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BOOK REVIEW

Hamza Gábor–Nótári Tamás: **Mit hoz a Múlt? Jog és kultúrtörténeti tanulmányok I.** [What Brings the Past? Studies on Legal and Cultural History I.]. Korona Kiadó, Budapest, 2006. 503 pp.

The joint volume of studies of Gábor Hamza, Academician Professor of ELTE and Tamás Nótári, Associate Professor of KRE was published in the autumn of 2006. The selection gathers twenty works published earlier, so it allows to study these papers together written in 10 years and not easily available individually, and to become familiar with the works of the two authors in a subtler form. The volume presents the studies in chronological order; most of them, as a mater of fact, cover subjects of Roman law; the reader will find a total of 8 writings on this subject. The other thematic unit of the volume comprises 6 studies on medieval subjects. The last 4 papers leading to the modern age and our present day are closed–in style and as a framework–by Gábor Hamza's study entitled *Comments on the role of Roman law in training lawyers.*[1] The last work in the volume, a study that raises a monument to the memory of the internationally renowned classical scholar and Byzantinist *Samu Szádeczky-Kardoss*[2] is a worthy memorial by the former student Tamás Nótári to his master not only with this obituary but perhaps with the whole volume. Below you will find a detailed analysis of two studies on Antique subjects of each of the authors; the rest of the studies will be commented upon only briefly within the framework of general remarks made on the entire volume.

[1] Cf. Hamza G.: A hazai jogászképzés történetéhez (The History of the Teaching of Lawyers in Hungary). *Magyar Jog* (1986) 21 sqq.; Megjegyzések a római jog szerepéről a jogászképzésben (The Role of Roman Law in Legal Education). In: Márta O.–Szabó B. (eds.): *Festgabe für János Zlinszky.* Miskolc, 1998. 569 sqq.

[2] Emlékezés Szádeczky-Kardoss Samu professzora (In Memoriam Prof. Samu Szádeczky-Kardoss). *Jogtörténeti Szemle* 1 (2005) 44 sqq.; In memoriam Samuelis Szádeczky-Kardoss piissimam. *Vox Latina* (2005) 142 sq.; Szádeczky-Kardoss Samu (1918–2004). *Aetas* 4 (2005) 182 sqq.

I. Gábor Hamza: Cicero's De re publica and Antique philosophy of the state

"Rome–contrary to the Greeks–created only one specific work on the theory of the state: Cicero's dialogue entitled 'On the State'", writes László Havas.[3] Yet, this work was published in Hungarian only in 1995[4] owing to Gábor Hamza, although the great *orator* worked more on it than on any other of his works. In addition to the hard labour of translating this work into Hungarian, in view of the composite nature of the text, the translator had to carry out the far from easy task of interpreting and processing the work too. "Quite often it was usual to misinterpret and underestimate Cicero's life work and qualify it partly lacking independent thought, eclectic and partly conservative or retrograde", writes László Havas.[5] Also thoughts provoking is what Gábor Hamza writes in his study: "The analysis of Cicero's works, primarily dialogues outstanding in terms of the philosophy of the state have been analysed mostly from philosophical aspect. Unfortunately, historical and legal approach is often forced into background."

Right at the beginning of his study, the author points out this contradiction in the assessment calling the attention to the necessity of treating the works in terms of legal history. The first part of the study describes the historical environment of the creation of *De re publica*, recognising that the age of Cicero is of great significance in the history of thinking and was a turning point in historical aspects. Concerning Roman philosophy of state, the 1st century B.C. can be considered a period of paramount importance owing to the connection made between Greek and Roman philosophy of state by Polybius. Contrary to Plato's and Aristotle's concept setting the city state in the centre and idealising it, Polybius now presents states that have grown beyond the condition of a polis, and are becoming empires–Sparta, Carthage and Rome–as examples to be followed, seeing the latter an existing, not utopian ideal state. The merit of the so-called Scipio circle that followed Polybius is immense in laying the theoretical foundations of the need to make changes that Rome, politically still operated under city state conditions, faced. Beside theory and thinking, however, just as important are the efforts to make changes in *praxis*,

[3] Havas L.: A politikai közgondolkodás főbb vonásai Rómában (Mainstream of Political Thinking in Rome). In: Havas L.–Óbis H.–Szűcs G.–Ujlaky I. (eds.): *Róma – Egy világbirodalom politikai, erkölcsi és történelmi eszméi I. (Roma – Political, Moral and Historcial Conceptions of an Empire I).* Debrecen, 1998. 5–57.

[4] Hamza G.: *Cicero. Az állam* (Cicero. The State). Budapest, 2007[3].

[5] Havas: *op. cit.* 18.

on the level of historical events. Sulla's title *dictatori* (*dictator rei publicae constituendae causa*) adopted and exercised in a new form of pubic law, the power alliance called the two "triumvirates", Caesar's eternal *dictatorship* all reflect the inefficiency of institutional frameworks as well as the need and efforts to change them.

In the second and third parts that present Cicero's philosophy of state, Gábor Hamza sums up the author's philosophical work and its significance in the history of philosophy with excellently selected excerpts. The call for creating relation between, synthesis of the Greek and Roman philosophy of state, the old city state organisation and the new empire state, and *populares* and *optimates* attaining balance of strength in the field of politics and society is one of the most important elements of Cicero's philosophical oeuvre. The notion of rotation, appearance in a blooming and declining stage of the three forms of constitution (kingdom, aristocracy, democracy) had been present since the beginning of Greek thinking. However, the excerpt quoted in the study properly underlines the characteristic Roman approach asserting that forms of state are filled with content by statesmen, suitable persons. Therefore, in the operation of states it is the personalities, *magistrati* fulfilling leader's offices, continuously replacing each other that the success, life of the state depends on. Here we cannot give a detailed description of the outstanding significance Romans attributed to *magistrati*, specific persons and ancient morals (*mores maiorum*).

The fourth part of the study (The bases of the ideal state in Cicero's thinking) points out: Cicero follows Roman approach to the extent that he does not present the ideal state as a utopia but finds it in Rome. The notion of the "mixed constitution" (*mikté politeia*) considered by him fundamental has been present since the greatest figures of Greek thinking; however, contrary to the Greeks Cicero works it out not on a theoretical basis. Cicero comprehends the organisational and moral (not power!) crisis of the Roman state, and makes an attempt to solve it relying on traditional Roman values: (*auctoritas*, *traditio*, *mores*) but integrates into them philosophical approaches of Greek origin just as the requirements of new social layers and power factors. The recognition and the elaboration of the theory of *concordia* and *consensus*, which can be interpreted in several ways, is Cicero's great achievement, it stays on a theoretical level though. Along with the thinkers of his age, neither does he recognise the rapid growth of the social role and weight of power of the army. The army of the age of the Republic was distributed among the three powers *populus*, *nobilitas* and *magistrati* equalising each other both in terms of the state and authority. By the 1st century, however, it had become a permanent institution that basically determined the power relations of the future owing to

both of its physical force and level of organisation more uniform than that of any other social group. Neither is–the often misinterpreted–best citizen, *princeps civitatis* or *moderator rei publicae* characterised by Cicero a monarch under the framework of the republic, or a supreme commander exercising his power in a disguised form but the restorer of the values, institutions of the *res publica*, a practical and political creator of *concordia* and synthesis that saves the order of the state in crisis. The replies of history to the crisis of the Roman Republic are known. After Cicero, who created synthesis on the level of theory, it was Octavianus Augustus who implemented the renewal of the state organisation in practice that brought further development for the empire through preserving old institutions where possible and taking political reality into account.

At the end of his study, Gábor Hamza describes the philosophical influence Cicero produced on the thinking of later ages, well representing the basic principle of the volume of studies formulated several times which asserts that intellectual values of past epochs are worth examining as much in their influence as in themselves. It is a special asset that the carefully selected notes attached to the paper serves not only literature on Cicero's oeuvre and works on the philosophy of state but calls the attention to works that analyse the most important political and historical issues of the age of the author.

II. Gábor Hamza: Institutions of Direct Democracy in the Antiquity and Civics

Gábor Hamza's other study discussed below contains not so much a detailed analysis of its subject but the related problems raised, and provides highly valuable guiding on the relevant literature and scientific standpoints.[6] The study discusses the Greek/Roman offices, institutions responsible for representing direct democracy, more specifically, controlling power, which were considered exemplary by thinkers of later ages, who tried to revive them in their own systems. Below, two of these institutions will be discussed in detail: the institution of the Roman *tribunatus*, and the institution of *defensor civitatis* of the late period of the Empire.

[6] Cf. Hamza G.: A közvetlen demokrácia ókori intézményei és a politikatudomány (Institutes of Antique Immediate Democracy and the Political Sciences). *Jogtudományi Közlöny* (2005) 76 sqq.; A közvetlen demokrácia antik intézményeinek továbbélése a politikaelméletben (Reminiscences of Antique Immediate Democracy in Political Sciences). *Parlamenti levelek 1999.* fasc. 6. 35 sqq.

The institution of the popular tribune of the Roman Republic established in 494 built a new determining element into a political structure that had existed for centuries. In the state organisation of the Republic based on the separation of the power of the *magistrati*, the *senatus* and the popular assembly, the office of the *tribunus plebis* sharing the licences of all the three institutions was a quite new component. It is beyond doubt that *tribunatus* is an element of accord (*foedus*) between the *patricii* and the *plebeian*; consequently, it is an office created primarily for political rather than state organisation related reasons; its key feature was that only the *plebeian* were allowed to apply for it. However, through the continuous opening up of promotion to traditional *magistratures* its such role decreased, and the function of limiting, controlling the power of *magistratus* could come to the foreground. In this respect, it is indeed a question of paramount importance–as the author points out–whether the *tribuni* were entitled to intervene against measures taken by *magistrati* and prevent them, i.e., whether they had the option of exercising *intercessio* that the *magistratus-collegae* were permitted to do. It is another important question if the *tribunicia potestas* enjoyed by them can be considered of equal value with *imperium* exercised by high *magistrati* (*consules*, *praetores*). It may refer to the outstanding importance of *tribunicia potestas* that Octavianus Augustus also exercised it in spite of not being (because of his *patricius* origin he was not allowed to be) a popular tribune.

These two questions–the problematic issues of *tribunus*'s *intercessio* and *potestas*–would deserve detailed analysis because without them the licences of the powers of the *tribunus* limiting the power of the popular assembly and the *senatus* (*ius agenndi cum plebe–cum patribus*, *ius intercedendi*) are more emphatically highlighted and the rights limiting the power of the *magistratus* are thrust into the background. Without them stressing the role of *tribunatus* limiting and controlling power might be exaggerated.

Considering the *defensor civitatis* of the late period of the Empire a prefiguration of the modern *ombudsman* might bring similar dangers. The collection of *annona*, the key tax constituting the most important part of financial administration was assigned in this period to the powers of *praefectus praetoriones*, the supreme administration holding civil governments together. Simultaneously, cities carrying out the actual duty of collecting tax lost their independence from the governments of provinces. It was through tax collection, a duty of city council members, *curiales*, that the central power tried to shift a part of the local administration tasks it was to fulfil on social layers that could still be burdened in terms of their financial performance. In the determination of their organisation and operation the leadership of the empire also had a say to an increasing extent.

The municipal offices having become increasingly unpopular due to growing duties were maintained by the central power through a series of coercive measures. Membership in the governing body of the city was made obligatory for the sons of council members and those who had a certain amount of property. It was not allowed to leave the city without the governor's permit; if somebody stayed outside the city for more than five years his property devolved to the city. Compliance with rules and enforcement of possible coercive measures were assigned to governors; that is, the key players of local administration were opposed to each other. The bodies of cities tried to collect the taxes levied on them primarily from the population of the countryside. Large estates enjoying immunity, increasingly growing provincial areas taken out of the scope of tax collection reduced the circle of taxpayers to a great extent. Yet the greatest part of tax burden was to be carried by the population of cities and *curiales* who were personally responsible for collecting taxes. Consequently, coercive measure taken by the State against *curiales* became stricter.

To avoid the new method of tax collection and increasing burdens put on the population and municipal leaders, the population of cities and municipal officials themselves tried to flee to the countryside. By strictly binding social groups to their abode, the Sate could obviously do no more than slow down this process. Along with the gradual decline of cities, the former fortunate distribution of duties and community of interest ensuring growth between the central administration and local self-governments terminated. The fate of the layers of municipal leaders was subordinated by the government of the empire to the interests of the army, the bureaucracy and big landowners in the provinces intertwined with them. Officials of the empire began to appear in the governing bodies of cities formerly having extensive autonomy. The *curator* was the municipal official sent by the provincial centre who coordinated tax collection carried out by the city. By that the State lost both the most important group linking the population and layers of leaders, and the basic units of regional administration.

It was this unfortunate process the leaders of the empire wanted to mitigate by organising the office of the defender (*defensores civitatis*) in 364, who would have had to defend the population in the provinces against the practice of shifting tax burden applied by municipal officials. However, once *curiales* had got into a difficult situation, they also had to be defended against the governors of provinces by the defender. Nevertheless, defenders were personnel of the central power–since they were appointed by the *praefectus praetorio* for five years–that is, they fulfilled duties similar to the *curator* rather than enforced municipal interests. The system of selection of defenders was later modified:

they were no longer appointed by the *praefectus praetorio* but were elected by *curiales* and bishops. Yet the office could not fulfil the role assigned to it.

Anastasius replaced defenders with a new official, *vindex* subordinated to the *praefectus praetorio*, who also fulfilled the duty of assessment and tax collection, so he was responsible for the financial administration duties that until then had belonged to *curiales*. However, the persons fulfilling the office soon became corruptible, bribable. For this reason, Iustinianus terminated the institution of *vindex*, and assigned the duty of tax collection again to *curiales*. Besides, his measure to make the defender the head of the city aimed at restoring a part of municipal autonomy. Now the defender was independent of the *praefectus praetorio*. He was elected for two years from *curiales*, the competent bishop in the region acted as his controlling body. The defender as the head (*arkhón*) of the city supervised each field of municipal administration. He chaired the meetings of the *curia*, acted as judge, and assisted *curiales* in collecting taxes. Nevertheless, cities becoming freer in terms of their self-government continued to be subordinated to the governors of provinces and the *praefectus praetorio*. The latter defined the amount of the tax to be collected, officials had to turn to him for guiding on taxation issues.[7]

Thus, in the history of *defensores* it is absolutely necessary to distinguish regulation before Anastasius from the regulation of Iustinianus. Dispensing with detailed analysis, it might be established that it is at most the latter that can be considered an "antique legal protection body".

These two offices–the *tribunatus* and the *defensores*–clearly shows that the institutions which can be considered the antique prefiguration of direct democracy should be approached with great care and in a subtle form. Nevertheless, Gábor Hamza's study provides an excellent starting point for this investigation. It makes the analyser's work extremely easy that it describes key points of approach and principles of evaluation in a concise form yet reflecting extensive knowledge.

III. Tamás Nótári: Religious aspects of the Roman concept of authority

Tamás Nótári's study analyses the religious, political and public law aspects of the Roman concept of authority with exemplary thoroughness, magnificently separating the concepts fundamental regarding the subject but often causing

[7] According to NI. 128.1. (545.) it was the *praefectus praetorio* who considered the exchange rate between the tax in kind and its value in money, and one had to ask the *praefectus praetorio* to certify the amounts of the taxes imposed on the territories, cities.

difficulties in interpretation: *auctoritas*, *numen*, *genius* and *imperium*. In the investigation of Roman public law it is indispensable to present a clear view of, understand the connecting points of holding offices, undertaking political roles and religion. This rather difficult task is made easier for us by the author through providing a superb treatment of the subject.[8] The detailed analysis of the concept of *numen* standing in the centre of the study examines the aspects of the concept significant in terms of public law one by one setting out from the etymology of the word. Of these, in our analysis we shall make comments on the role of the concept of *numen* played in exercising supremacy focusing on the institution of *triumphus* and the concept of *numen Augusti* integrated in the early emperor cult.

This dual character of the term *numen* as a human feature expressing superhuman skills yet related to earthly persons clearly exemplifies the ambivalent view of deifying humans in the Roman mind. In Roman thinking holding offices, assuming dignities, what is more, the operation of state institutions is a superhuman activity based on superior skills that stand beyond the human world, which is, however, separated by several confines from raising those who perform it to the level of gods, from their epiphany. The skills of leadership, governance had been superhuman features since the beginning of Roman history, and were interwoven with religious images, symbols. The Roman *magistrati* inherited the sacred character of kings preceding them as much as Augustus took over these sacred elements to represent his power. It is associating office-holding with superhuman skills from which the striking character of the Roman mind–contrary to the Greek–can be deduced, which asserts that the success, prevailing of the Republic depends on the persons holding the offices rather than the institutions. Namely, they possess *numen*, more specifically numinous force that is able to fill official power, *imperium* or *potestas*, with content. In the Greek world we find no traces of this distinguished respect and sacredness that surrounds *magistrati*.

Among the traditions of the Republic this superhuman character was expressed perhaps the most spectacularly by *triumphus* due to triumphant commanders and by the symbols related thereto. The development of the *triumphus* ceremony can be connected to the introduction of the Jupiter cult on the Capitolium in 509 B.C.. Triumphal marches adhering to original religious traditions were held until the end of the 3rd century. The *triumphi* held later

[8] Nótári T.: Numen és numinozitás – a római tekintély fogalom vallási gyökerei (Numen and Numinosity – Origin of Roman Concept of Authority). *Aetas* (2003) 33 sqq.; Nótári, T.: On Some Aspects of the Roman Concept of Authority. *Acta Juridica Hungarica* (2005) 95 sqq.

cannot be considered a continuation of sacred tradition. During the time of the *triumphus* the triumphant commander was given exceptional, almost divine respect. For this one day he was allowed to put on *toga palmata*, the clothes of the Jupiter statue on the *Capitolium*, and *toga picta* decorated with golden stars that was worn over it. The *triumphator* was driving a two-wheeled, *quadriga* pulled by four horses, the same as the one that decorated the tip of the temple on the *Capitolium*. Yet the act of putting on the divine vestments did not mean being transformed into a god since the *triumphator* offered a sacrifice in Jupiter's temple and during this act he took off his symbols of power. In the *triumphus* it is not Jupiter but his statue that the commander personifies. The aforesaid commander's capes are taken off the statue of the chief god on the Capitolium, the *triumphator*'s face is painted vermilion to make him look similar to Jupiter's statue made of clay. The commander's stiff posture on the triumphal carriage looking straight ahead is highly statue-like. The fact that he only appears to be a god is emphasised by one of the most characteristic accessories of the triumphal march, the slave standing behind the *triumphator* on his *quadriga*, who continuously reminds him of his mortality *(hominem te memento! Hoti anthrópoi eisin!)*.

The cult of rulers of the early period of the Empire was expressed by the assembly of symbols surrounding the officials and commanders of the Republic, manifesting respect gathered around the person of *princeps*. The symbols of the Republic were only secondarily, gradually accompanied by a set of sacred tools of eastern origin. The author properly emphasises that the cult of rulers rooted in the traditions of the Roman Republic and religion must be sharply separated from eastern type notions. Augustus also used sacred elements expressing numinosity to support his own power with transcendence. While doing so he created a new quality through expropriating and monopolising the set of sacred tools *magistrati* were entitled to rather than by inventing new symbols. Therefore, the influence of eastern elements produced on the Roman concept of the ruler–often overemphasised in literature–should be evaluated only in accordance with their significance.

Even in the case of Augustus the tradition of *triumphus*, the highest respect due to living humans stands out of sacred elements. The primary *princeps* was first given the right to wear a commander's wreath in all of his public appearances; then, he obtained the privilege to put on *triumphator*'s clothes on the first day of each year. By that he wanted to make the narrow, single day content of the respect due to the commander permanent and to concentrate it around his person.

The transcendental quality of the *princeps* of the early period of the Empire also properly reflects the caution of the Romans observable in their handling

the divine respect due to humans. In his life Augustus did not become divine, *divus* but received the title *Divi filius* after Caesar who had become Divus Iulius. In the adoption of the name *Augustus* in 27 B.C. certain sacred images also played a part. Following the reign of Caesar and Augustus, it became a tradition to make the rulers of the early period of the Empire divine *divus* after their death through a resolution of the senate, in the form of *consecratio*. The cult of rulers who had become divine was conducted by a six-member committee of priests (*seviri augustales*) set up for this purpose in each city. Rulers who had ancestors made divine supported the cult of the cult of their ancestors since by that they could legitimise their own divinity (as sons of god, *divi filius*). The cult of Caesar, then of Augustus had their own priests, cultic places.

The transitional nature of the essence of the "Augustan Caesar" between the two worlds is superbly grasped by the author through opposing and comparing the pair of concepts *numen Augusti* and *genius Augusti*. In this comparison he expounds that the *princeps* has both *genius* and *numen* but does not become in his life either *numen* or *genius*. Thus, the Roman mind "authorises" earthly persons to have only divine traits but not divine essence. By the ceremony of making them divine, dead Emperors obtain divine essence and do not become divine.

The author closes his highly ripened study supplemented with rich notes with a quite stylistic and thoughts provoking final part, in which he calls the attention to the neurotic relation of Roman thinking to numinosity and the sense of *tremendum maiestatis*.

IV. Tamás Nótári: Campaign strategy in ancient Rome

The *Commentariolum petitionis*, i.e., the *Handbook for applicants for offices* written in 64 B.C. is the oldest campaign strategy document that has been preserved for us. In this handbook Quintus Tullius Cicero, younger brother of the orator/politician Marcus Tullius Cicero gives advice to his elder brother on how Marcus can win *consul*'s dignity. The up-to-date translation of the work into Hungarian was published owing to Tamás Nótári in 2006. In the first part of the subsequent study on the translation, analysed below, he examines the genre related and historical issues of the text.[9] Originally, the text is a private letter,

[9] *Hogyan nyerjük meg a választásokat? Quintus Tullius Cicero: A hivatalra pályázók kézikönyve* (How to Win an Election? Quintus Tullius Cicero: Commentariolum petitionis). Translation, notes, preface by Nótári, T. Edited and study by Németh, Gy. Szeged, 2006.

and not a work called commentary (*commentarius*) in Latin literary terminology. The author, Quintus Tullius Cicero calls it also only *commemtariolum* and at the end of his letter he asks his brother Marcus to share his comments with him so that the work could be published later as a real *commentarius*. In the second part of his study Tamás Nótári describes the opposing views on the issue of authorship; nevertheless, he points out that–if for nothing else than for lack of evidence–Cicero junior should be considered the author of the work.

In the parts that consist of the analysis of the content of the work Tamás Nótári highlights the institutions of the elections of the Republic of Rome having special significance: *collegia*, *clientela* and *ambitus*. While describing them he outlines the political careers of the two Ciceros. By that the method of the treatment of the subject becomes quite new since the author does not provide a description of election rules, traditional institutions, does not answer to the questions "How to apply?" or "How to become *magistrati*?" but gives an insight into the reality of Roman elections, analyses the factors that actually influenced events and decisions, replying indeed to the question "How to win?". Namely, winning the elections required in addition to–in many cases instead of–advantageous skills (oratory expertise, aptness) and virtues required on the level of traditions, primarily financial and "human" support, which was attained in many cases with morally and legally dubious tools. The *collegia* established by private persons were originally communities of defence of persons who lived at a given settlement or belonged to one religious cult; later on they undertook to take part in political fights too. They campaigned for the benefit of *patroni* who paid them, quite often they represented the interest of their patrons and weakened their opponents with actions on the verge of legality.

The *patronus-cliens* relation used also for election purposes had already lost its original character in the period under review. Instead of winning the service of the *cliens* who owed gratitude and respect to the *patronus* for his pecuniary support, it was more advantageous for the applicants for offices to win the leaders of *collegia*. "Convincing" the saluters (*salutatores*) who acted as opinion leaders in the campaign and contacted candidates one by one was also of greater significance than using *clientela*. Anyway, once the *patronus-cliens* relation had become loose, the behaviour, party affiliation of *clientes* became unstable, dependant on financial services.

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33 sqq. See Nótári, T.: Quaestio de ambitu. *Collega* (2001) 43 skk.; *Cicero. Négy védőbeszéd* (Cicero. Four Speaches). Translated, preface and notes by Nótári, T. Szeged, 2004; Jogtudomány és retorika – Cicero pro Murena. *Jogtudományi Közlöny* 26 (2001) 470 sqq.; Nótári T.–Németh Gy.: Választási kampánystratégia az ókori Rómában (Electional Strategy in Ancient Rome). *Jogtudományi Közlöny* (2006) 268 sqq.

Nótári's study clearly points out that winning *magistrati* required considerable financial performance and political compromises even from such a person with features of moral highness as Marcus Tullius Cicero. An example for the latter is the compromise Cicero entered into with his former opponent, his later fellow *consul*, Antonius. To restrain election related frauds, bribery, attempts were made also in Rome, but due to the very nature of the system these attempts could be only contradictory half-measures.

A good example for this contradictory nature is that legally sanctioned election fraud, *ambitus* was distinguished from morally despised but not punished unethical campaigning, *ambitio*. Relations based on financial services: *clientela* and *salutatio* were not considered *ambitus*; that is, under their cover election bribery, pay offs could be implemented. Consequently, relevant laws and resolutions of the *senatus* could sanction only the phenomena that were outside the allowed scope of support (recruiting party adherents for money; distributing free tickets to gladiators' games; excessive hospitality; etc), but they were not able to take action on the merits against hidden corrupt practices. At the very end of the study, the author describes the development and operation of the court of justice adjudging election fraud cases (*quaestio ambitus*). Tamás Nótári's paper provides a magnificent insight into the political conditions of the late period of the Republic, making our vision developed about the age more subtle–realistically and seeing the essence.

Among the other papers on antique subjects in the volume Tamás Nótári's study entitled *Weighing of souls and fates in Homer and Vergil* puts one of the most ancient and most known symbols of administration of justice, the scales, in the centre of its analysis.[10] In various representations we can often see Iustitia with scales in her hand; scales as the means of administration of justice, the symbol of justice can be found in many places in Greek literature. Nótári analyses loci in the Iliad to examine the concept of law and justice(ness) as it is presented in Homer. By extensive analysis of the symbols of scales he provides additional information on the subject. Tamás Nótári's paper entitled *Hesiod and the beginning of the philosophy of law* highlights a few concepts instructive for legal history and philosophical analysis from excerpts of the main works of Hesiod, who lived at the turn of the 8th and 7th B.C., *Theogonia (Birth*

[10] Cf. Nótári T.: A mérleg mint az igazságszolgáltatás jelképe Homérosnál (The Scale as the Symbol of Jurisdiction in Homer's Iliad). *Collega* (2002) 43 sqq.; Vallástörténeti megjegyzések az Aeneis XII. 725–727. sorához (Comments on the Religious Aspect of Aeneis XII. 725–727.). *Belvedere Meridionale* (1999) 4 sqq.; The Scales as the Symbol of Justice in the Iliad. *Acta Juridica Hungarica* (2006) 249 sqq.

of the Gods) and *Erga kai hémerai (Works and Days).*[11] Perhaps the most valuable part of the study is the examination of the occurrence and role of *diké*, one of the most diverse concepts of antique legal history in Homeric epics and Hesiod's *Erga*. In his paper entitled *The spear as the symbol of power and property in ancient Rome* Tamás Nótári provides the analysis of another important symbol of legal history, the spear (*hasta*) in terms of the history of symbols.[12] Setting out from Gaius's description of *legis actio sacramento in rem* the author examines the symbolism of the spear and the rod, illustrating it with parallels from the history of law and religion and analogies. Gábor Hamza's paper entitled *Alien influences in Roman law from the Twelve Table Law to the classical age of Roman law* surveys one of the most significant periods of the development of law embedded in the connections of the entirety of the history of antique law.[13] By highlighting institutions taken over from other ancient laws less underlined in the literature he provides new points of approach for the treatment of the period of Roman law analysed to the greatest extent.

Among the studies on medieval legal history, first we can read Tamás Nótári's paper entitled *Virgil – bishop and author of parodies.*[14] Virgil,

[11] Cf. Nótári T.: Hésiodos jogkoncepciója (Hesiod's Concept of law). *Jogtudományi Közlöny* (2005) 328 sqq.; Bürgergemeinschaft und Rechtsgedanke bei Hesiod. In: Németh Gy.–Forisek, P. (ed.): *Politai et Cives. Epigraphica III. Hungarian Polis Studies 13.* Debrecen, 2006. 7 sqq.

[12] Nótári T.: Festuca autem utebantur quasi hastae loco. *Acta Facultatis Politico-Iuridicae Universitatis Budapestiensis de Rolando Eotvos nominatae* (2004) 133 sqq.

[13] Cf. Hamza G.: Idegen hatások a római jogban a XII táblás törvénytől a római jog klasszikus koráig (Forign Influences in Roman Law from the Twelwe Tabels to the Classical Age). *Jogtudományi Közlöny* (1996) 319 sqq.; Észrevételek az antik római hadtörténet jogi és gazdasági vonatkozásairól (Comments on Legal and Economic Aspects of Antique Roman Military History). *Jogtudományi Közlöny* (1996) 83 sqq.

[14] Cf. Nótári T.: *A salzburgi historiográfia kezdetei* (The Beginnings of Historiography of Salzburg). Szeged, 2007; *Források Salzburg kora középkori történetéből* (The Sources of Early Medieval History of Salzburg). Szeged, 2005; Adalékok Virgil apát és püspök bajorországi működéséhez (Remarks on Bishop Virgils Activity in Bavaria). In: Marton, Sz.–Teiszler, É. (eds.): *Medievisztikai tanulmányok.* Szeged, 2005. 99 sqq.; On bishop Virgil's litigations in Bavaria. *Acta Juridica Hungarica* 48 (2007) 49–70. Két forrás a kora középkori Salzburgból, Notitia Arnonis – Epistola Theotmari (Two Sources from Early medieval Salzburg). *Aetas* (2004) 72 sqq.; Salzburg neve a kora középkori forrásokban (The Name of Salzburg in Early Medieval Sources). *Collega* (2005) 48; Az univerzum képe Aethicus Ister Cosmographiájában (The Idea of Universe in the Cosmographia of Aethicus Ister). *Belvedere Meridionale* (2005) 38 sqq.; Gesta Hrodberti. In: Havas, L.–Tegyey, E.: *Classica – Mediaevalia – Neolatina.* Debrecen, 2006. 131 sqq.; Virgil és Bonifác – egy konfliktus jogi és irodalmi síkjai a kora középkorban (Virgil and

bishop of Salzburg of Irish origin (749–784) is noted for creating the earliest works of the historiography of Salzburg: *Gesta sancti Hrodberti confessoris*; *Libellus Virgilii* and *Liber confraternitatum*. First, the author analyses the Bavarian home and foreign affairs conditions of the period; then, he follows up the confrontation between Virgil and Bonifacius. In his study he discusses primarily Virgil's activity in Bavaria in detail. Tamás Nótári's study entitled *An early medieval show trial–the dethronement of Tasilo III* analyses the show trial of the Bavarian duke Tasilo III, more specifically its legal background.[15] Tasilo III, the last duke of the Agilolfing dynasty, which ruled in Bavaria for two centuries, was deprived of his throne by Charlemagne not in a military clash but in a show trial arranged in 788. The Frankish ruler first isolated Tasilo both in home and foreign affairs; then, in 787 made him his vassal. The main charges brought against Tasilo were unfaithfulness to the liege lord, and leaving the royal army without permission. The study gives a detailed analysis of Tasilo's oath of allegiance, so the reader having provided information on the lawsuit gets an insight into the most important elements of medieval feudal law too.

The title of the eleventh study of the volume is *The trial of Metod in the Council of Regensburg*.[16] Tamás Nótári's paper first describes the concept of

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Bonifacius–Legal and Literary Aspects of a Conflict in Early Middle Ages). *Jogtudományi Közlöny* (2007) 100 sqq.; Virgil püspök bajorországi jogvitáinak margójára (Remarks on the Litigations of Bishop Virgil in Bavaria). In: Mezey, B.–Révész T. M. (eds.): *Tanulmányok Máthé Gábor 65. születésnapja tiszteletére*. Budapest, 2006. 369 sqq.

[15] Cf. Nótári T.: III. Tasziló trónfosztása – adalék egy koraközépkori koncepciós perhez (Tassilo III's Dethronement – Contributions to an Early Middle Ages Show Trial). *Jogtudományi Közlöny* (2005) 503 sqq.; Tassilo III's dethronement – contributions to an early-middle-age show trial. *Publicationes Universitatis Miskolciensis. Sectio Iuridica et Politica* (2005) 65 sqq.; Személyállapot és társadalomszerkezet a kora középkori Bajorországban (State of Persons and Social Structure in the Early Medieval Bavaria). *Acta Facultatis Politico-Iuridicae Universitatis Budapestinensis* 42 (2005) 163 sqq.; III. Leó pere és az Salzburgi Érsekség megalapítása (The Trial of III. Leo and the Establishment of the Salzburg Archbishopric). *Collega* (2005) 55 sqq.; A kora középkori salzburgi birtokjegyzékek margójára (Remarks on the Early Medieval Notitiae of Salzburg). *Jogelméleti Szemle* (2006) www.jesz.ajk.elte.hu

[16] Cf. Nótári T.: Conversio Bagoariorum et Carantanorum. *Aetas*, 2000. 93 sqq.; Avarok a Kárpát-medencében – Szádeczky-Kardoss Samu: Az avar történelem forrásai (Avars in the Carpathian Basin – Samu Szádeczky-Kardoss: Scources of the Avarian History). *Belvedere Meridionale* 12 (2000) 110 sqq.; On the Avar Related Chapters of the Conversio Bagoariorum et Carantanorum. *Chronica* (2005) 26–39. Megjegyzések a Conversio Bagoariorum et Carantanorum avar vonatkozású fejezeteihez (Comments on the Avar Related Chapters of the Conversio Bagoariorum et Carantanorum). In: Balogh, L.–Szakra, D. (eds.): *Tanulmányok a középkorról*. Szeged, 2001. 67 sqq.; De Consultis Bulgarorum.

Christianisation of Carantania and Pannonia, and presents the missionary efforts made by the Pope, the Byzantine Emperor and the Eastern Frankish ruler in Bulgaria. Here the legal history element is the description of the circumstances of Metod's trial in Regensburg. The author focuses on the charges formulated in *Conversio* and their background, and the further stages of Metod's teachings from the viewpoint of the legal historian. Tamás Nótári's fourth writing on medieval subjects is entitled *The fight between Christianity and the Islam in the world view of Enea Silvio Piccolomini (Pope Pius II).*[17] The study describes the thinking and practical activity of Aeneas Sylvius Piccolomineus, the later Pope Pius II (1458–1464), the excellent Humanist and significant ecclesiastical politician. Both of the two sources analysed by the author are permeated with fear from the expansion of the Turks and ecclesiastical policy urging to take action against it. One of them is a speech addressed to an assembly held in Frankfurt in 1454 on the destruction of Constantinople and the war to be started against the Turks; the other source is his letter written already as the Pope to Mohamed Sultan, in which he expounds his views on the Islam quite lengthily.

In his study entitled *St Stephen's laws and Europe*[18] Gábor Hamza writes an appreciation of the first Hungarian king's role in legal history. He underlines that his significance lies in his consistent actions to create the bases of

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Collega (2002) 47 sqq.; Róma és Bizánc missziós kísérletei a IX. századi Bulgáriában. (Missionary Work of Rome and Byzantium in the 9th Century in Bulgaria). *Belvedere Meridionale* (2005) 22 sqq.; A Salzburgi Érsekség és Metód konfliktusa a Conversio Bagoariorum et Carantanorum tükrében (The Conflict Between the Archbishopric of Salzburg and Metod in the Conversio Bagoariorum et Carantanorum). *Belvedere Meridionale* (2005) 37 sqq.; On the Avar-related chapters of the Conversio Bagoariorum et Carantanorum. *Chronica* (2005) 26. sqq.

[17] Cf. Nótári T.: Szemelvények Aeneas Sylvius Piccolomini „Európa" c. művéből (Fragments of "Europe" by Aeneas Sylvius Piccolomini – introduction and translation). *Documenta Historica*, 42. Szeged, 1999; Timur Lenk és I. Bajazid Aeneas Sylvius Piccolomini „Európa" című művében (Timur Lenk and I. Bajazid in "Europe" by Aeneas Sylvius Piccolomini). *Belvedere Meridionale* (1999) 89 sqq.; A török terjeszkedés állomásai Aeneas Sylvius Piccolomini „Európa" című művében (Stages of Turkish Expansion in "Europe" by Aeneas Sylvius Piccolomini). *Aetas* (1999) 149 sqq.; Aeneas Sylvius Piccolomini szónoki művészete (Rethorics of Aeneas Sylvius Piccolomini). In: Weisz E. (ed.): *Középkortörténeti tanulmányok.* Szeged, 2003. 103 sqq.; Die Geschichte des Grafen Ingo bei Enea Silvio Piccolomini. In: *Varietas Gentium–Communis Latinitas.* XIII International Congress for Neo-Latin Studies. Budapest, 2006. 96.

[18] Cf. Hamza G.: *Sanctus Stephanus et Europa – Szent István és Európa – Saint Étienne et l'Europe.* Budapest, 1991; Szent István dekrétumai és a jusztiniánuszi törvényhozás (Decrates of I. Stephan and the Legislation of Justinian). *Jogtudományi Közlöny* (1996) 418 sqq.; Szent István törvényei és Európa. In: Hamza, G. (szerk.): *Sanctus*

uniform Hungarian legal system. A new aspect of the method of approach applied and the consequences drawn by Gábor Hamza is that relying on an extensive material of sources he convincingly proves that St Stephen's laws represented not only the creation of Hungarian legal unity but the universality of *ius*, which included the elements of Roman (Byzantine) law, and Europeanness that could organically unite new elements with the traditions of *consuetudo*. All this advanced the integration of our country into Europe to a decisive extent. Gábor Hamza's paper entitled *Accursius and the beginnings of European jurisprudence* analyses the life work of the great medieval jurist.[19] When creating *Glossa ordinaria* Accursius obviously relied on the compilation of glossaries of his predecessors, so especially on the works of his master, Azon teaching at the University of Bologna, yet his work can be considered original. The study provides excellent additional information on the significance of Accursius, the first epoch-making figure of medieval jurisprudence hard to overestimate.

Each of the four studies leading to our present age is the work of Hamza Gábor. In chronological order the first of them is *The appearance of the Macedonian issue in European politics*.[20] In accordance with the Preamble of the Constitution adopted on 17 November 1991 of Macedonia, which declared its independence on 25 January 1991, Macedonia is the national state of the Macedonian people, which ensures equal rights and permanent coexistence for each ethnic minority. All this includes the right of ethnic minorities to cultivate their special cultural and national assets. This regulation makes this young state with a small territory exemplary among European and especially Balkan peoples. This is one of the reasons why the author describes the little known development of Macedonian history and law. In his study entitled *The develop-*

Stephanus et Europa. Budapest, 1991. 24 sqq.; Die Gesetze (Decreta) Stephans des Heiligen und Europa. In: *Szent István és Európa – Saint Étienne et l'Europe*. Budapest, 2001. 33 sqq.; Die Gesetzgebung Stephans des Heiligen und Europa. In: *Ungarn-Jahrbuch* (1995–1996) 27 sqq.

[19] Cf. Hamza G.: Accursius és az európai jogtudomány kezdetei (Accursius and the Beginnings of European Jurisprudence). *Jogtudományi Közlöny* (1999) 171–175.

[20] Cf. Hamza G.: A macedón kérdés az európai politikában I. (Question of Macedonia in European politics I). *Magyar Szemle* (2001) 202 sqq.; A macedón kérdés az európai politikában II. (Question of Macedonia in European politics II). *Magyar Szemle* (2001) 192 sqq.; Macedónia és a föderáció lehetősége a Balkánon (Macedonia and the Possibility of Federation on the Balkan). In: *„Nem akarunk csonka Európát..."*. Budapest, 2002. 143 sqq.; A macedón kérdés megjelenése az európai politikában (The Appearance of the Macedonian Question in the European Politics). In: *„Nem akarunk csonka Európát..." op. cit.* 149 sqq.

ment of the constitution of the United States of America and Europe Gábor Hamza describes the development of the constitution of the U.S., and simultaneously analyses the codes made in Europe.[21] The subject is approached from a special aspect to the extent that not only does it analyse the development of the constitution of the North-American state but demonstrates the influence produced by political thinkers and philosophers of state of ancient and modern Europe (Plato, Aristotle, Cicero, Sallustius, Sir Edward Coke, John Milton, John Locke, Hugo Grotius, William Blackstone, Montesquieu) on the creation of the fundamental law in force for the longest period in the history of law.

In his study entitled *Sir Henry Maine and comparative jurisprudence* Gábor Hamza provides additional information on Sir Henry James Sumner Maine's epoch-making work published in 1861 "Ancient Law, its Connection with the Early History of Society and its Relation to Modern Ideas".[22] The creation of the discipline of comparing law and the conditions of its education is perhaps more important that the work itself. The starting point of the latter was provided by the chair set up for Maine in 1869 in Oxford. Gábor Hamza's last study on the modern age is *The idea of the "Third Empire" in German philosophical, literary and political thinking in the 20th century".* [23] It is a great

[21] Cf. Hamza G.: Az Egyesült Államok alkotmányfejlődése és a modern alkotmányosság (Constitutional Development of the USA and Modern Constitutional Law). In: Mitchell, R.: *Az Egyesült Államok alkotmánya* (The Constitution of the United States). Budapest, 1995. VII sqq.; Az Egyesült Államok alkotmányának és alkotmányfejlődésének sajátosságai (Specialities of the Constitution of the United States and it's development). *Jogállam* (1996) 125 sqq.; A római jog hatása az Amerikai Egyesült Államok jogfejlődésére (Impacts of Roman Law on Constitutional Developement of the USA). *Jogtudományi Közlöny* (2003) 234 sqq.

[22] Cf. Hamza G.: Maine és az összehasonlító jogtudomány (Maine and the Comparative Jurisprudence). *Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae* (1987) 7 sqq.; Sir Henry Maine et le droit comparé. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae, Sectio Iuridica* (1991) 59 sqq.; Sir Henry Maine és az összehasonlító jog (Sir Henry Maine and the Comparative Law). *Jogállam* (1998–1999) 326 skk.; Sir Henry Maine et le droit comparé. *Orbis Iuris Romani* (2005) 7 sqq.

[23] Cf. Hamza G.: A „Harmadik Birodalom" eszméje a német filozófiai és politikai gondolkodásban (The Idea of the "Third Reich" in the German Legal, Philosophical and Political Thinking). *Magyar Tudomány* (1999) 779 sqq.; Die Idee des "Dritten Reichs" im deutschen philosophischen und politischen Denken im 20. Jahrhundert. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae, Sectio Iuridica* (1997) 11 sqq.; *Die Idee des "Dritten Reichs" im deutschen philosophischen und politischen Denken des 20. Jahrhunderts.* Zeitschrift der Savigny-Stiftung (2001) 321 sqq.; The Idea

merit of the work that it corrects, presents a subtle interpretation of the images, notions incorrectly or imprecisely formed in public knowledge regarding the National Socialist Germany. The name "The Third Empire", for example, was not the name of Germany; what is more, it was just the Propaganda Ministry of the German Empire that prohibited the official use of the term in 1939. From then on Germany's official name was "Empire of Greater Germany". That is, the new kind of use of the word Empire–contrary to historical predecessors– did not emphasise continuation with earlier empires but the existence of a state with new quality, which was in this quality the first and only such state.

When evaluating the volume of studies critical comments should be made only with regard to the typographical implementation. The exterior of the book is aesthetic; the cover representing Cicero's speech against Catilina is a witty choice. However, the type-size and space between lines used in editing the texts of the studies are inappropriate; the placements of notes at the end of the writings is not expedient either in the event of papers so richly supplied with notes. The selection, clear arrangement of headings (in this case, more precisely, footings) very important in compiling volumes of studies is not proper either.

The joint volume of studies of Gábor Hamza and Tamás Nótári not only makes our legal history knowledge richer by providing new information but also offers numerous new viewpoints in the scope of examination and research highly extensive in terms of subjects. It is a special feature of Gábor Hamza's studies that in them one of the most acknowledged Hungarian scientist of Roman private law enriches our knowledge in the field of *ius publicum*. In Tamás Nótári's papers we can witness and use the benefits of the fortunate and for the legal literature fertile meeting of the erudition of the legal historian and classical scholar.

Miklós Kelemen

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of the "Third Reich" in the German Legal, Philosophical and Political Thinking in the 20th Century. *Diritto e cultura* (2001) 127 sqq.

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IMRE VÖRÖS*

The Likely Effects of the Treaty Establishing a Constitution for Europe (TCE) on the Hungarian Legal Order

Abstract. The study analyses the potential effects of the Treaty on the Hungarian Constitution and its application by the Hungarian Constitutional Court, and the more general–and at the European Law's present stage of the development unavoidable–problem of the theoretical analysis of European Law as a branch of law.

The study points out that the Hungarian Constitution's Accession Clause (Article 2/A) has not solved the problem of the primacy of Community Law, as far as the relationship between EU Law and the Hungarian Constitution is concerned, therefore the Constitutional Court encounters a problem that is increasingly difficult to resolve, when facing issues relating to the incompatibility of Hungarian statutes with EU Law. The study criticises some solutions proposed by the Constitutional Treaty (e.g. the institution of "recommendations"–(the present practice of "guidelines" etc.) which is definitely unconstitutional according to the Hungarian Constitution and its application practice by the Constitutional Court. Finally the study complements the problems thus outlined with the fact that the concept of EU Law and its various parts have not been clarified from a dogmatic perspective–the time has come to systematize this enormous material of law, especially when a Constitutional Treaty makes the attempt to summarize the legal fundaments of the unprecedented effort to develop an economic and political integration in Europe.

Keywords: TCE, EU law, Hungarian Constitutional Court, lawmaking

I. The current problems facing the Constitutional Court with respect to the application of European law**

The application of European law confronts the regular courts the Constitutional Court, as well as the Hungarian lawmakers with *new challenges.* One year after EU accession some focal points are beginning to emerge which will or may become placed in a new context with the adoption of the TCE. We conceive of

* Senior Adviser, Institute for Legal Studies of the Hungarian Academy of Sciences, H–1014 Budapest, Országház u. 30.
E-mail: voros@jog.mta.hu

** The study continues the analysis of the constitutional development in Europe dealt with in a previous study: see *Acta Juridica Hungarica* 48 (2007) 5–23.

the application of European law in two ways: for one application by lawmakers and then by law enforcement and the judiciary. In the former case we refer to a very particular instance of legal application, specifically the domestic transposition of current directives or of future European framework law. This, though it completely differs in nature from traditional legal application in this particular European legal context, is undoubtedly (also) legal application in the context of the *sui generis* European legal order. The lawmaker creates domestic law by simultaneously applying European law.

1. The application of European law has reached the *Hungarian Constitutional Court* already. Decisions have been handed down in two cases already, though in both cases the court specifically investigated the compatibility of Hungarian legal acts with the Hungarian constitution, and emphatically did not look at the issue of compatibility with European law–either through reviewing the validity of a directive or the adequacy of implementation 17/2004 (V. 25.) Constitutional Court decision (ABH 2004, 296–297); 744/B/2004 Decision of the Hungarian Constitutional Court, Alkotmánybíróság Határozatai, 2005, No. 2, 81]. The connection with European law stemmed from the fact that in the first case the issue revolved around the implementation of an EU regulation, while in the second case a European directive served as the basis for drafting the Hungarian legal act in question.

Moreover, as a result of two motions the Constitutional Court was recently faced with the task of adjudging the constitutionality of a Hungarian legal act on the basis of European law, to determine the compatibility of the former with the latter (no decision has been rendered as of Spring 2006).

2. In one case the issue is the faulty transposition of a *directive*–a directive on company law. The directive seeks to achieve that member states liberalise the rules and conditions for increasing the capital of public limited-liability companies. The lawmaker–obviously as a result of a translation error–amended Act CXLIV (Companies Act) of 1997 on commercial companies, but due to the presumable misunderstanding of the directive the regulation not only failed to become laxer, but in fact become extremely prohibitive, so that in effect it is more or less impossible to increase capital. The result is thus a transposition that is not compatible with the directive, is in fact contradictory to it. The Hungarian lawmaker therefore not only failed to fulfil its legislative duty, but in fact further restricted the regulation–effectively moving it away from its stated objective.

According to European law a faulty implementation can be corrected if a court requests a preliminary judgment from the ECJ in the context of a legal suit, noting the incompatibility of Hungarian and European law. On the basis of the ECJ's verdict the court may then render the given statute ineffective.

Parties whose interests are violated can of course also turn to the Commission, asking it to take measures to remedy the situation.

In the case at hand the first possibility did not even arise, since due to specifics of the case the commercial parties involved had intensive and good co-operation and therefore a legal dispute did not arise. More importantly, the ECJ's practice does not recognise the direct horizontal effect of a directive. The second venue is more of a theoretical possibility that will yield results only very slowly, if the Commission decides to intervene at all.

Thus the corporation turned to the Constitutional Court with the motion to declare the statute unconstitutional and to thus render it void, on the basis that the Hungarian legal regulation is not compatible with European law (the directive).

Nevertheless, the Accession Clause contained in Article 2/A of the Constitution does not touch upon compatibility with European law, but rather creates the constitutional possibility of transferring the exercise of certain competencies. It does not refer to the issue of supremacy of European law over Hungarian legal order, and most definitely not to the formers' relation to the Constitution and its respective supremacy.

Given that the Companies Act will be repealed by the entering into force of the new company law, the proceedings are likely to be halted.

3. In *another case* members of parliament turned to the Constitutional Court regarding the amendment of Act LVIII of 2001 on the central bank. The amendment changed the rules concerning the nomination of members of the monetary board, dividing the right to nominate between the president of the National Bank and the prime minister. The petitioners do not claim that the amendment conflicts with the Hungarian Constitution's provisions on the central bank in Article 32/D, but they claim that the change is in direct conflict with the TEC's Article 108, which in their interpretation mandates the absolute independence of central banks in member states. Petitioners further request that the Constitutional Court, before rendering a verdict turn, to the ECJ with a preliminary question concerning the issue of compatibility.

Here the Hungarian Constitutional Court must again decide on the *compatibility of Hungarian law with European law,* even though the Constitution *does not proscribe* anything concerning the primacy of European law. As unlike the regular courts the Hungarian Constitutional Court *only and exclusively decides* on the basis of the Constitution, and does not consider the whole of Hungarian law nor the European law that has become part of Hungarian legal order as a consequence of the Accession Treaty's–Act XXX of 2004–Article 2 or the *acquis,* its verdict must be based on the Constitution *alone.* Unconstitutionality can therefore only be determined if a Hungarian legal act is in conflict with the

Hungarian Constitution. In the case of conflict *regular courts* naturally *have no qualms about applying European law based on the primacy of Community law. But for the Constitutional Court the situation is different.*

4. Though in the professional literature there have been proponents of the view that based on the ECJ's practice European law is even above the member states' constitutions[1]–and this is reinforced by the TCE's Article I-6–the significance of the issues is too great to be decided merely by an interpretation of the TCE Article I-6. In our opinion such a fundamental issue of principle can only be decided by the member states' constitutions themselves, they are the only ones who can decide to raise European law above themselves. It is only the *Constitution itself which can constitute a public power above itself.*[2] This presumes, however, that the public power and its legal order stand even above the Hungarian constitutions, above the member states' constitutions, since European law cannot be measured by the *constitutional standards of the member states.*

Especially not since they were *not created for this policy objective,* thus the comparison with them is a *conceptual non-sequitur.* It is also practically impossible to expect that European law be compatible with national constitutions since–assuming a subordinate position–this would enable Constitutional Courts to "tear apart" European law as they see fit (by declaring it incompatible with their respective constitutions). Though the idea of European law being above the constitutions (its priority over them), is clearly deducible from the ECJ's practice, and the TCE's Article I-6 also contains this point unequivocally now, based on the presentation of the previously analysed Constitutional Court practices and the member states' constitutional courts' reservations about this, a *clear situation* in this regard could only emerge if the Hungarian Constitution were to be *amended* in a way that *unequivocally states that European law is above the Constitution.* Due to the TCE's explicit declaration on the issue settling this matter up cannot be delayed any longer.

5. Given the lack of an explicit regulation in the Constitution the situation is by no means simple.

[1] Horváth, Z.–Ódor, B.: *Az Európai Unió Alkotmánya* [The Constitution of the European Union]. Budapest, 2005. 80; based on the Convention's text the problem was previously brought up by: Czuczai, J.: Utószó. *In: Jogalkotás, jogalkalmazás hazánk EU-csatlakozása küszöbén* [Legislation, application of law before the EU-Accession]. Budapest, 2003. 150.

[2] See Vörös, I.: Az EU-csatlakozás alkotmányjogi: jogdogmatikai és jogpolitikai aspektusai [Constitutional law: legal dogmatic and legal policy aspects of the EU-Accession]. *Jogtudományi Közlöny* 57 (2002) 397.

5.1. One probable scenario in the first of the two cases outlined above is that the Constitutional Court will conclude that the directive's faulty transposition is an unconstitutional failure to act and will thus–in addition to declaring the respective statute unconstitutional and repealed–obligate the lawmaker to fulfil its legislative duties and by a specific deadline create a new regulation that is compatible with European law.

According to the Constitution currently in force, declaring unconstitutionality cannot be based on Article 2/A, but only on the Constitution's Article 7 (1), which prescribes the compatibility of Hungarian law with international law. Referring to this paragraph would be in order in as far as the Accession Treaty in itself is an international legal treaty, and should therefore in principle be compatible with the law that is subject to constitutional review. European law itself, however, which through Article 2 of the Accession Treaty *continuously keeps* seeping into Hungarian law (for instance through the adoption of directives/-framework law by European lawmakers), does not qualify as international law.[3]

The possibility of direct conflict with the Hungarian Constitution does not even arise, as the given Hungarian statute is not in direct conflict with the Accession Treaty (international law), but only indirectly through the European law that flows in as a result of the treaty. Given the lack of a rule concerning primacy, the first example of case law introduced above poses a poses a real theoretical-dogmatic challenge to the Hungarian Constitutional Court.

5.2. But the second case is by no means an easy bit to chew for the Hungarian Constitutional Court, either. For the reasons cited above one cannot refer to an infringement of the Constitution when one has (or should have) to decide on the compatibility with TEC Article 108. In addition, since this is not the misimplementation of a directive, the question of a constitutional infringement caused by a failure to act does not even arise. The legal instruments mentioned in the first case (requesting a preliminary ruling from the ECJ in a regular court procedure or notifying the Commission to request an intervention at the ECJ) are useless in this instance.

5.3. The cornerstone of the Constitutional Court's expected decision will be an interpretation of the Constitution's Article 2/A, which according to the unanimous opinion of academic literature on the subject is equivocal, badly designed and offers a confusing regulation concerning the transfer of competencies.[4] The two cases could have the consequence of almost provoking the creation of rules concerning the issue of primacy between the Constitution

[3] See the analysis of European law as a *sui generis* law distinct from international law in: Vörös: *op. cit.*

[4] See for example Czuczai: Utószó. *op. cit.* 135.

and European law. Such a rule could provide the basis for future decisions of the Constitutional Court in similar cases that are likely to arise. As long as there is no such rule in the Constitution, in my opinion it is impossible for a law to give a mandate to the Constitutional Court to request a preliminary ruling from the European Court of Justice (currently such an authorisation does not exist).

6. Very probably *serious difficulties* can be expected with respect to the *Charter of Fundamental Rights* in the TCE's Part II. Though the Charter of it is compatible with the member states' own constitutional traditions, its significance is so massive that it will impact member states' constitutional court practices.

The problem is that the Hungarian Constitution is well-drafted in the area of formulating the basic constitutional right to social security, for instance, It contains a sufficiently, but not overly detailed regulation (Constitution Article 70/E). In its practice the Constitutional Court applies a rather limited interpretation of this regulation and does not consent to the indeterminate, boundless expansion of this right (for instance the right to housing). According to the Constitutional Court there is no constitutional right for anyone to receive a certain type or amount of social provision, either. The right to a social security consists on the one hand of the state's obligation to secure the citizens' physical existence through social benefits, and on the other hand of organising and operating the social insurance/social security system and associated institutions 42/2000 [(XI. 8.) Decision of the Constitutional Court, ABH 2000. 329]. The lawmaker has significant freedoms in determining the concrete content of these constitutional obligations and in drafting the corresponding laws, a specific vision of these contents is not part of the fundamental right to social security.

The Charter of Fundamental Rights could be likened to a "colourful bouquet" consisting of everything, the contents of which have been collected by its makers on the great "field" of European fundamental rights. It contains all of the imaginable fundamental rights–such as for example the right to "good" (?) administrative processing (Article II-101), or the right to "found a family" (Article II-69), which allows for numerous interpretations. The social (Article II-94) and other rights secured by the Charter of Fundamental Rights go well *beyond* the member states' constitutions' own conception and fundamental rights content.

This is not a problem in itself since the Charter–as pointed out above–can *only* be applied in the context of implementing Union law and in *harmony* with the member states' common constitutional traditions. This limitation only applies, however, if the Charter recognises a fundamental right derived from common traditions [Article II-112 (4)]. In any case, some of the Charter of Fundamental Right's formulations *approximate* political declarations and–no matter how noble they may be–they are often oblivious of the *social and*

economic policy realities. Therefore, as a consequence of the increasing presence and appearance of the European context in the fundamental rights issue, the Charter of Fundamental Rights could have an *undesired compulsory effect* on the member states' constitutional court practice as well.

It is a requirement according to the principles of rule of law and due process that the TCE's text be useful for real application: a formulation that is reminiscent of a political declaration is very difficult to predict in terms of the consequences it engenders.

II. The problems of lawmaking

1. For legislators in the member states future problems may not only stem from the faulty transposition of a *directive* or a future *framework law,* but they may even arise from a faultless transposition.

1.1. The European law's *sui generis* nature manifests itself in the sources of law as well, since the directive–in terms of its content–cannot be considered a "true" source of law from the vantage point of continental European conception of the law, or from the perspective of lawmaking. The European state formation resulting from integration is an institution that is conceptually closely tied to the law–it mirrors the novelty of the *"Staatenverbund",* its incomprehensibility and unfathomable nature in terms of traditional constitutional law and sources of law categories.

1.2. If we talk of a "Staatenverbund" and boldly stop ourselves from demanding traditional criteria of statehood, then of course it will be understandable and easily acceptable that there are institutions among the sources of law that (while prescribing legislative obligations to the member states) are in themselves in legal technical terms nothing more than–severed from the constitutional context above–a guiding working paper or a draft.

But the *directive/framework law* cannot be separated from the process of creating a historically unique state formation. This is exactly what it corresponds to, what it reflects. More specifically its *sui generis* peculiarity, namely that is *mixed:* in part and fundamentally it develops on an intergovernmental basis, but the supranational elements are growing. In other words their *proportion changes* in the course of permanent, continuous evolution.

One of the basic areas of development is *continuous legal harmonisation:* it is no surprise therefore that in the areas characterised by intergovernmental co-operation–if these areas can at all be separated, probably only on a theoretical level, of course–the *indirect European lawmaking,* legal harmonisation through directives/framework laws, plays a fundamentally important role.

The contradiction therefore, between the working paper as a source of law, its legal character, is only apparent: substantively it is a working paper, but legally it is a binding instrument requiring legislation. This is exactly the peculiarity that *adequately portrays,* mirrors this particular European integration attempt; it is a good expression of the legal taxonomy and source of law manifestation of this odd mix of intergovernmental and supranational elements.

1.3. The directive's/framework law's source of law character *remains unchanged* in the TCE [Article I-33 (1)] as compared to TEC Article 249. The framework law is itself a legislative act that sets binding objectives for all member states but leaves the choice of tools and forms of fulfilment up to them.

1.4. The ECJ very rarely requires the verbatim transposition of directives (Case C-339/87. *Commission v. Netherlands* [1990] ECR I-851. Points 26–28).

In practice directives are published with such content that the lawmakers in the member states *hardly have any wiggle room* in freely choosing the tools and forms of complying with them. Legislators are in effect often compelled to just take the text of the directive and use it without the slightest modification, which can have rather adverse effects for the member states' law in terms of *taxonomy.* But of course it is also true that the bureaucracies in the member states' ministries tend towards investing the least amount of work possible in fulfilling the task of drafting legislation.

1.5. The constant modifications resulting from transposition *distort the given member state's* original *legal policy and dogmatic approach* because *elements that are alien to the system* disrupt the thought process underlying the. The transposition lead to such a *confused mass* of legal regulations that are to some degree determined by member states', and in some part by European legal policy considerations.

As these are not even *remotely identical*–in fact the directives become necessary to ensure that the European legal policy ideas are enforced in the member states' legal orders–the law originally based on a coherent, uniform legislative concept *falls apart* into several, often clearly distinct parts. This *increasing internal inconsistency* growing over time makes it harder for the law to be applied by member state courts and other authorities, not to mention the fact that it becomes harder for those addressed by the law–natural and legal persons–to voluntarily shape their behaviour to comply voluntarily with the requirements of the law.

Before our very eyes the insurance act or our act on international private law fall apart, for instance, as a consequence of the Hungarian legislators' compulsory activities.

2. But the *European lawmaker* can also cause numerous problems: I refer to the *guidelines* and *notices* issued by European authorities and agencies. These

notices, etc., naturally lack a legally binding force, they "merely" inform the "subjects" in the name of the agency how *the agency* will proceed in applying the statute.

2.1. The Directorate-General for Competition is especially active in implementing *competition law,* which affects the "heart" of European economic law and its most important issues. It did not only issue a statement on minor cartels, but also provided guidelines concerning block exemptions, which is of fundamental importance with respect to cartel prohibition; the guidelines pertained to EC Regulation 2790/1999 on block exemptions in respect of vertical restrictions of market competition, as well as to EC regulation 1/2003, which is the backbone of community competition law.[5] The bureaucracies' astounding practice then multiplies, the various documents feed on each other: they issue notices on modifying previous notices....

2.2. Two officials argued for instance in the professional literature that the "guideline" issued in connection with EC Regulation 1/2003 is necessary as it takes up certain questions concerning which there had been no consensus at the time the regulation was drafted, and thus they could not be integrated into the legal text[6]...–but the office will nevertheless (!) proceed on the basis of the guideline and apply Community law correspondingly! The extensive guidelines and notices often do not adhere to the requirements applied to the statute, but rather correspond in terms of content to the administrative/public administration law and administrative instructions issued to subordinated bodies.[7]

2.3. The TCE Article I-33 (1), last phrase *integrates this practice into the European constitution* and thus endows it with the rank of a constitutional institution. It states that legislative acts termed "recommendations" and "opinions" by the TCE do *not have binding force.* This naturally fails to resolve the problem what it is that they *exactly "have".* But making these papers part of the TCE also makes it impossible to attack the practices in the ECJ on the grounds of "European unconstitutionality". Theoretically such a complaint would be possible with reference to the rule of law so often and emphatically referred to in the TCE, if the subject of "unconstitutionality" were not enshrined in the European constitution itself.

[5] As a cautionary example we point to a list that includes only a minor part: *Versenyjog* [Competition Law]. Budapest, 2004. 291–292.

[6] Hossenfelder. S.–Lutz, M.: Die neue Durchführungsverordnung zu den Artikeln 81 und 82 EG-Vertrag [The new implementation decree for Articles 81 and 82 of the EC Treaty]. *Wirtschaft und Wettbewerb,* 53 (2003) 125.

[7] Rittner, F.: Die neuen Guidelines für Vertikalvereinbarungen [The new guidelines for vertical agreement]. *Wirtschaft und Wettbewerb,* 50 (2000) 831.

2.4. The publication of such sources of law is in sharp contradiction with the Hungarian constitutional approach. The Hungarian Constitutional Court, in its *60/1992 (XI. 17.) Constitutional Court decision* (ABH, 1992, 275) did not even investigate the constitutionality of the circulars, guidelines, and notices that had become prevalent in Hungarian legal practice–as tools of anti-democratic control–under the party dictatorship between 1947–1989, as those do not qualify as statutes in the Hungarian legal system according to Act XI of 1987 on lawmaking. And the Constitutional Court only reviews the constitutionality of laws. They are simply not suitable for review by the Constitutional Court. In this verdict the Constitutional Court condemned in sharp terms this inherently unconstitutional practice embraced by the authorities–but the practice has no legal effect at all. From this often-cited landmark *decision that is considered a key precedent* it could be concluded that the authorities have no right to inform the addressees about the practices they plan to follow in the future and about the factors that inform their decision-making, since they have to apply the law and not their own notices. By publishing the decision-making criteria the authorities–the executive power–really usurps the competencies of the legislative power–without adequate legal authorisation to do so, of course.

2.5. The situation is the same in European law: issuing notices and guidelines–recommendations and opinions according to the TCE's Article I-33 (1) last phrase and Article I-35 (3)–brings the *danger* that the Union authorities will replace the European legal acts and legal order with their own interpretation–which extends far beyond legal application–and thus with this mere publication influence the behaviour of addresses as if they had issued quasi-legal acts.

Thus *lawmaking and the application of the law become mixed up* and the separation between two distinct branches of power become blurred. This is a serious violation of the democratic principle of separation of powers. (This is exactly how Rittner assesses the practices concerning community competition law.[8])

This European constitutional law phenomenon seriously *undermines* the basic principle and concept of *rule of law* (the rule of law as an "area of freedom, security and justice") as it is currently laid down in TEU Article 6, enshrined as a basic value in the TCE preamble and in Article I-2, and formulated as a key Union objective in Article I-3 (1) of the TCE. This phenomenon violates the constitutional principle of rule of law because it seriously endangers and violates due process in the Union. The reverse side of the coin only serves to

[8] Rittner, F.: Das neue europäische Kartellrecht: bürokratische Netze statt Herrschaft des Gesetzes? [The New European Cartel Law: Bureaucratic Webs instead of Rule of Law?] *Orientierungen zur Wirtschafts- und Gesellschaftspolitik*. 2004.

underline our concerns. It was precisely the *ECJ* which quite resolutely espoused the position that the member states' authorities' "circulars"–which in the given case were compatible with the directive, by the way–could not be placed on the same level as the implementation of a directive and that the implementation could not be replaced by or "redeemable" with such a document.[9] In this decision the ECJ pointed out that an authority's practice that was compatible with the directive could be easily modified, while–moreover–such a "circular" lacked the transparency and publicity required by the rule of law.

From the above one could arrive at the *conclusion* that the "recommendations" and "opinions" raised to constitutional level by the TCE are neither compatible with the rule of law, which is considered one of the core values and basic objectives of the EU and the European legal order, nor with the constitutional requirement of due process, as derived from the rule of law. The TCE's inconsistent, internally contradictory regulation in this regard can exert a negative effect on the Hungarian Constitution and constitutional thinking. The Hungarian authorities' aforementioned practice is gravely unconstitutional in itself; but if they themselves were to issue recommendations in reference to community competition law based on EC Regulation 1/2003, for instance, then according to TCE Article I-33 (1) they would proceed lawfully and constitutionally, but at the same time they would violate the TCE's Preamble, its Articles I-2 and I-3, as well as the Hungarian Constitution. Given the TCE's adopted text we cannot offer any solutions to this problem, but we thought it was important to draw attention to it.

III. The legal dogmatic and taxonomic problems of European law as a branch of law

1. A significant portion of the problems outlined above undoubtedly have their origins in broader contexts. The introduction in part I of this study of the need, in fact burning necessity, of creating the TCE–and of the related developments–in some sense "advanced" the notion that the European constitutional legislators not only wanted to quantitatively amass the "Treaties" constituting primary European law into a unitary framework, but that they wanted to created something qualitatively novel. One key goal was to achieve clarity, to get rid of the confusions and overlaps. At the same time the TCE seeks to further develop integration, the Union undoubtedly makes a leap forward towards

[9] Case C-315/98. Commission v. Italian Republic [1999] ECR I-8001.

developing the political union (for example limiting the veto right, dual majority and strengthening the role of the European Parliament).

The need for a quality summation is not formulated with regards to European legal order, though it appears that there would be great need for it. On the remaining pages we will attempt to address the question of what European law is, as the basic law of which the European constitutional legislators have drafted, adopted and recommended to the member states for adoption the TCE? What is European law in terms of taxonomy and the branch of law it belongs to?

What are we talking about when we refer to European or Union law?

2. It is true that the subdivision and classification of this field of law and legislation can still be regarded as an open issue. The problems already begins with the concepts in EU law/EC law, the lack of a basis for distinguishing Union law and Community law.

The professional literature seeks to bridge the problem by assuming that Community law is the sum of first pillar laws, while Union law consists of the laws in the second and third pillars.[10] Correspondingly, one could talk of Union law narrowly understood (as law enshrined in the second and third pillars), or Union law more broadly, which would comprise both Union law narrowly understood and Community law (in this interpretation Union law broadly understood would obviously be a cover concept devoid of real content).

The confusion is increased rather than mitigated by the fact that the TCE itself uses the *terminus technicus* "Union's law" [e.g. Article I-9 (3)].

Considering the fact that next to the unclear terms "European law"/"EU law"/"EC law" other terms have began to spring up, such as for instance "Community/European company law", "Community/European competition law",[11] European economic law,[12] or "European private law"–which even boasts its own journal–we need to ask the following question.

How can the continuously expanding, ever larger and irrepressibly growing legislation be systematised and interpreted as legislation, or maybe even as a separate branch of law? The question is evident: are the criteria and conceptual framework of a traditional branch of law still useful in this case; and if yes, then with what content?

[10] See for example Schweitzer, M.–Hummer, W.: *Europarecht* [European Law]. 5th edition. Berlin, 1996.

[11] e.g. Mestmäcker, E.-J.–Schweitzer, H.: *Europäisches Wettbewerbsrecht* [European Competition Law]. 2nd edition. München, 2004.

[12] Zäch, R.: *Grundzüge des Europäischen Wirtschaftsrechts* [Fundamentals of European Economic Law]. 2nd edition. Zürich, 2005.

What does the concept of "European law" mean today and especially after the drafting and adoption of the TCE (regardless of the ratification process and the results of the referenda)?

Let us consider some examples.

Regulations in the European Community company law aim to secure the legal safeguards for the exercise of the basic freedom to settle and start business anywhere; thereby they protect and maintain the unity of the internal market from this perspective. The primary legal policy purpose of European company law therefore is not the codification of all company types (for example the form of a public limited-liability company).

Community competition law does not move within the traditional framework of competition law/competition law: the objective of its legal policy is not to protect the freedom of competition from attempts to curb it, but primarily to protect, maintain and secure the unity of the internal market. The ECJ's well-known verdict in *Walt Wilhelm v. Bundeskartellamt*[13] addresses this issue specifically.

2.1. Initially the European integration process was geared towards creating a customs union, then an internal market, and then with time it moved further to envision achieving economic union. The continual progress, realisation and deepening of the economic union, especially the creation of the common currency, increasingly shifted the economic/commercial law character of the integration process into the direction of political union. This inevitably brought to the forefront and strengthened the public law and constitutional aspects of integration–which had been present in traces already at the outset.

Though the legislation customarily referred to as EU institutional law was characterised by strong constitutional features from the beginning on, and the concept of "European constitutional law" popped up as well,[14] it was hardly possible to identify a separate constitutional law branch in European law, in the sense the term is traditionally understood in nation-state/member state law. At least not if we see the criteria of traditional legal branches in the homogeneity of the subject matter of regulation and the method of regulation.

2.2. The difficulties begin already with the fact the European law is not the legal order of a state, but of–for a lack of a better word–what the German Constitutional Court has termed "*Staatenverbund*". Even today this is an unprecedented experiment in European history whose objective is to create a *sui generis* European economic and political union. As the polity itself cannot be dogmatically, and from a state theory perspective, be identified with a

[13] Case C-14/68 Walt Wilhelm v. Bundeskartellamt [1969] ECR 1.

[14] *Europäisches Verfassungsrecht. op. cit.*

traditional state in terms of legal dogma or state theory, its legal order cannot be understood in the traditional nation-state/member state categories either. The two types of legal policy approaches and objectives are too different.

The more or less dominant theoretical approach that considers the EU an autonomous legal order[15]–and holds that European law is neither nation-state nor international law but a *sui generis* legal order–makes such an interpretation, categorisation and systematisation impossible in any case.

3. The EU legal order and its further development was first based on the establishment of economic union and was then increasingly driven by the goal of creating political union. This determines the legislation's dual policy objectives and dual nature. Correspondingly–in a somewhat simplified manner–the economic union's legal policy objectives were geared towards the achievement and preservation of a single internal market.

The creation, maintenance and further development of political union, however, was (again somewhat simplified) determined by the legal policy objective that sought to determine at each stage the respective proportions of intergovernmentalism and supranationalism–always with respect to the current social/political possibilities, needs and necessities.

3.1. The difficulty of the problem is exemplified by the structure of the various monographs dealing with European law. The comprehensive treatises simply put the European legislation side-by-side, but quietly acknowledge that this legislation in reality more or less develops based on the possibilities offered by everyday politics, by the perspectives current political considerations bring to the issue. Its formation, development, expansion and content are determined by political will formation, the ability to find consensus. The result is that it develops not with the systematic/dogmatic conceptions of a unified nation-state, but more as a patchwork, thus to a significant degree dependent on chance.

One cannot expect European law to have an immanent system quality–with the taxonomic quality that is present in the national legal orders of nation-states–a real, overarching conception of legal branches that is composed of different legal branches.

Let us consider some other examples!

The "Handbuch des EG-Wirtschaftsrechts"[16] edited by Dauses and Zäch's previously mentioned „Grundzüge des europäischen Wirtschaftsrechts"[17] are

[15] Vörös: *op. cit.* III. 3.3.

[16] Dauses, M. (ed.): *Handbuch des EG-Wirtschaftsrechts* [Manual of EC Economic Law]. München, 2002.

[17] Zäch: *op. cit.*

just as incapable of realising their undertaking without exploring the so-called institutional/organisational law–that is the constitutional aspects *par excellence*– as Nicolaysen's work on the same legislation[18], which carries the subheading "European Integration Constitution" itself. The same constitutional issues (among others) are discussed in the standard work by Craig–de Búrca, which nonetheless bears the title "EU Law". [19]

3.2. Designating the field of law as sui generis may be appropriate, but cannot conceal the fact that the scientists who came up with the term 'sui generis' had no clue themselves as to what is that they are talking about. Developing the contours of political union and stabilising it specifically requires that the concept be endowed with specific meaning.

From the diverse studies, monographs and analyses on the subject it becomes increasingly apparent that a tripartite division is becoming generally accepted.

a) First: the history of integration; the legal dogmatic and legal policy foundations of European law and its characteristic features, as well the concept of European law as unified Union law.

b) Second: the two major part of European law today: the institutional/organisational law (institutions, structure, operation, lawmaking, legislation) and the so-called "substantive" law (e.g. competition law, company law, public procurement law, penal law).

c) Third: the Union policies.

Such a tripartite division illustrates at least that today a monograph on European law can no longer be just a mass of ten chapter on positive laws lined up next to each other. The reasons are threefold.

For one, European law has to reflect the dual legal policy objectives of preserving and further developing economic and political union, which one cannot expect from the legal order of a nation-state, especially since that is not even its legal policy function. This consideration suggests that we ought to use the greatest caution possible when using traditional categories of legal branches, such as for instance European "private law", "competition law", "company law", "penal law" or even "constitutional law". The *sui generis* content of European law and its characteristic features–including its structure and categories–are determined by integration and its specific legal policy objectives. These legal policy objectives–let us reiterate this–cannot be described (without

[18] Nicolaysen, G.: *Europarecht. Die Europäische Integrationsverfassung* [The European Integration Constitution]. 2nd edition, Baden-Baden, 2002.

[19] Craig, P.–de Burca, G. (eds.): *EU Law*. Oxford, 2003.

the danger of causing confusion) with reference to the content of the nation-states'/member states' legal systems.

The distinction drawn between Community law and Union law also increasingly appears artificial, and with the conclusion of the TCE's ratification–that is if it is successfully concluded in every member states–it will become outmoded. Regardless of the TCE's actual fate European law must be presented and systematised in dogmatic unity. The excessive overlaps between TEU and TEC also serve to underline this requirement.

Secondly, the well-known distinction between *"institutional" and "substantive" law* is also becoming increasingly *questionable.*

The institutions constitute the EU's constitutional, more precisely its administrative law foundations and structure, naturally *including the lawmaking and legislative system.*

But the "substantive" law can no longer be simply reduced to the law on the internal market–in other words to the legal guarantees concerning the four fundamental freedoms–either. Obviously the four fundamental freedoms constitute the absolute core of the EC, whose legal regulation and safeguarding–from common trade policy to rights to subsidies–far extends beyond merely maintaining the internal market narrowly understood and the prevention of market distortions. The legislation created in this context–the "law" of the internal market–is not "substantive" law, but *a more or less coherent sui generis field of law, codified around the four fundamental freedoms and following its own particular legal policy objectives.*

"European" competition law, public procurement law, company law or the law concerning state subsidies all give legal form to *different aspects* of maintaining, safeguarding and protecting a single internal market; they formulate the categorical imperative and legal guarantee of the free movement of goods, services and capital, as well as the freedom to settle, countering potential state or corporate efforts to distort or inhibit said freedoms. In terms of their legal policy context and their objectives, the regulations concerning European company law (European Economic Interest Groupings, European Public Limited-Liability Company), can be much better understood as implementing executive regulations of TEC Article 43–that is the free movement of persons and settlement, as well as the safeguarding of the freedom of services–rather than as a form of some "real" nation-state commercial law's codification of company law.

From the above it appears to follow that the use of a "European" private law, economic law or trade law category would be rather *problematic.*

Finally, an open question still remains: what should happen to the various *policies* in terms of legal dogmatic–where should one put the common first pillar trade policy, for example? The strong market protection/administrative

aspects of this policy are obvious. But what about the second and third pillars? A common trade policy, with its legal policy orientation towards protecting the market, its legal/administrative set of tools, as well as its economic diplomacy competencies (WTO, etc.) undoubtedly belong to internal market "law".

The other two pillars belong to traditionally understood public law issues. But in light of the above the division of European law into "private law" and "public law" seems like a rather dubious experiment that I would caution anyone from engaging in. Such a division would be extremely unlikely to have a convincing legal dogmatic basis, as it would say or express nothing regarding the EU's previously often emphasised own and specific legal policy objectives.

4. In my opinion European law could be divided into a *general part* and a *special part.* These categories obviously do not correspond to a nation-state's legal system's traditional conceptual criteria concerning general and special parts.

The *general part* would deal with the historical development of integration, as well as the foundations and objectives of the EU's social, economic and legal policies.

The *special part* can be further broken down into two parts: *First* into the constitutional foundations (institutions and their operation, lawmaking and legislation, the legal nature of European law, the second and third pillar policies) realising the political union. Secondly, it would incorporate the subpart on the legal safeguards for preserving the *single internal market* and the realisation of the *economic* union which, *in a systematic perspective,* would summarise these safeguards' various aspects and legal institutions embedded in a mutually referential *context.*

* * *

In our opinion the presentation of the TCE and the analysis of its effects makes it inevitable to take a look at the fate of European law as well. A dogmatic rethinking of the European legal system is a task, however, that the Hungarian and European legal scholarship and legal practice–including the legislators–will have to face up to as soon as possible, regardless of the TCE's political fate and its substitution with the planned Reform Treaty.

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FERENC KONDOROSI *

The Challenges of Sustainable Development and Globalization from a Human Right's Perspective

Abstract. Nowadays globalization and sustainable development are interconnected economic factors having positive and negative effects on various aspects of human rights. Although the internationalization of human rights and the birth of their so-called third generation can be attributed to globalization, it has increased disparities regardless of anti-discrimination principles of human rights. There is a minimum level of economic development and resources essential for providing full-scale human rights coverage, for this reason both IMF and World Bank has on several occasions been charged with prescribing structural reform projects and shock therapy measures on state budgets, that significantly deteriorated the conditions in the population's economic and social rights. The active participation in the global problem's solution is also an important element of the UN Secretary General's strategy which aims at turning the UN into an international organization that does not watch mass scale human rights abuses silently, is able and willing to act to promote development, security and human dignity in order to achieve global freedom. Not only the active role of the international organizations, but also the decision-making process closer to the levels accessible to people must also be reinforced to improve the human rights dimension of sustainable development.

Keywords: globalization, sustainable development, third generation of human rights, universality of human rights

Globalization is a term widely used these days, with many cherishing its advantages and many warning over its dangers. Globalization itself is a phenomenon that has numerous aspects, it first of all means economic and social trends growing global and consequently various economic and social conflicts becoming international, while their solutions requiring common international actions and cooperation. The recognition that certain backlashes of globalization must be treated on an international level and with a complex, holistic approach has led to the permeation of the idea of sustainable development.

Sustainability or sustainable development emerged in parallel to the growing importance of the aspects of the environment within the scientific community.

* Professor, Corvinus University Institute of International Studies; Government Commissioner for Integrity and Freedom
E-mail: kondorosi.ferenc@meh.hu

The concept became one of the defining notions of international relations when in 1987 the Environment and Development World Committee of the UN General Assembly published its "Our common future" report outlining the chance of a new era of economic growth. An era where economic expansion comes together with the preservation of natural resources and at the same time brings a solution to the eradication of poverty. Sustainable development is a form of development that satisfies the needs of today without endangering the chance of future generations to satisfy theirs.

Sustainable development rests on three basic pillars: social, economic and environmental aspects. These must be taken into consideration together, along with their interactions when different development programs are constructed. uch holistic approach is generally found in human rights discussions and the provision of human rights is part of sustainable development as well. One aim of sustainable development is to put an end to poverty, to secure social welfare for the generations of the present and the future, thus sustainable economic development is inconceivable without ensuring social rights.

The trend of globalization has adverse effects as the competitive liberal state, the so-called free market model grants priority to individual achievements, selfcare and harsh market competition while state involvement is minimized and government regulations avoided. This model evolved historically in Anglo-Saxon countries, today mostly dominating in the United States. The main characteristic of globalization is the unlimited flow of capital, therefore globalization favors the spreading of the free market model that grants priority to the interests of capital investments. State regulations, administrative institutions devoted to the strengthening of social cohesion limit the interests of capital. Investors counter such limitations by pulling out capital and moving it towards free markets that promise faster returns and greater profit. This is a trend that threatens European social states.[1]

Among present social structures it would be unimaginable as well as unacceptable to pull down the social state while rebuilding the total reign of free market competition. This move would not only bring social tensions on a severe, unmanageable scale, but would also lead to controversial results within the economy. Obviously enough if the state cuts its spending for reasons of competitiveness on education for example, then in the long run it can easily

[1] See Szamuely, L.: A globalizáció és a kapitalizmus két alapmodellje I. és II. [Globalization and the Two Basic Models of Capitalism I and II]. *Kritika*, 31 (2002) május és június, http://www.szochalo.hu/index.php'?p=news&news_id=2602 and http://www.szochalo.hu/index.php'?p=news&news_id=2603. 2005. október 5.

bring about adverse effects due to the reduced quality of labor, thus further eroding overall competitiveness.

As the above example clearly shows, free market economies do not have the necessary self-control mechanisms in place, production and distribution of certain "goods" cannot be trusted to the forces of the market. Labor is one example of such "goods". Its production requires a great deal of efforts by the state in the fields of demographic policy, education and healthcare draining significant public spendings. Similarly, sound state commitments are necessary for securing long term interests of future generations in environmental issues for instance. Sustainable economic development therefore demands a well balanced approach to social and environmental aspects, an approach that cannot be expected from profit oriented competition on its own, without state intervention.

As a result of the realities of globalization and the requirements of sustainable development, convergence of two models, that of the competitive state and the welfare state, can be anticipated in the long run. In Europe, systems of national economic redistribution need some serious rethinking, but instead of elimination, they must be rationalized. Elements of social services with potential hindering effects on productivity need to be put aside, while means of selfcare should be encouraged including greater involvement of non-governmental organizations. Besides social solidarity, therefore, in order to create good balance, awareness of individual responsibility must also be raised.

Within economies, globalization translates to the spread of the model of the liberal free market state, whereas in a globalizing world resulting in mutual interdependence of states, peoples and individuals in the case of social trends. The effects of trends in one group of states do not stop at their borders, rather end up making the consequences felt in other countries. For the same reason the concept of and demand for global governance are voiced, along with the strengthening of the roles and rebuilding of the foundations of international organizations, particularly the United Nations and its Agencies and the international financial institutions.

Responding to the impacts of globalization, relations between states intensify resulting in significant developments in international law. Although sovereign states remain primary subjects of international legal procedures, as early as the end of 19th century produced international organizations founded to facilitate interstate relations on an even more complex scale and playing a growingly greater role. One result of globalization in international law is "transformed sovereignty": full powers over domestic issues are "limited" by international commitments and stand to give way to the power to influence decisions made on an international level as the degree of sovereignty. Such

capabilities can be increased by self-limiting classic sovereignty and joining international organizations.

Also in response to the challenges of globalization the scope of the rule of international law expands rapidly, thus making states cooperate in more and more issues of international relations that used to be governed exclusively by domestic powers such as respecting human rights and freedoms. They seek common solutions to problems out of their reach due to the effects of globalization including the protection of the environment, trans-border crime (drugs trafficking), or even filling social gaps such as the struggle against poverty. These issues are gaining momentum in the activities of international organizations.

Globalization itself comprises of several trends with antagonistic effects. The penetration of free trade is usually considered its primary source and manifestation, thus inducing analysis mainly of its economic dimension. Subsequently the relationship between globalization and human rights is primarily approached from the aspect of the impact on human rights by international economic trends. At the same time the impact on globalization by human rights must also be mentioned, as well as those of the revolution in technology and information, and not only from the perspective of economic development, but also the functioning of civil society.

Globalization and the internationalization of human rights and freedoms

The *ideology* of human rights dates back to the formation of bourgeoisie and the civil revolutions, when citizens' demands were translated into freedom rights in constitutions and other documents of constitutional importance against the state and ruling power. Economic development including improvements in infrastructure and travel and also expansion of trade intensified not only state-to-state relations, but also relations among citizens of different states. Intensified relations have brought along phenomena and problems driving states to solve them together, thus requiring international cooperation and international standards of regulation. In the early 20th century, the impacts of economic development reached such an extent that demanded international regulation of labor conditions (first that of child and woman labor), leading to the foundation of the International Labor Organization in 1919. Premature attempts of international human rights regulations included first the protection of rights of foreign citizens, later the regulation (prohibition) of issues on an international scale, such as slave trade and the trafficking of women, but the real driving force towards international law was brought about by the horror of

the WWII. By this time the impacts of globalization reached a level of strength where it became obvious that no state is entitled to do whatever it wants with its own citizens, and that no state can repeatedly ignore human rights without one way or another affecting other countries, mostly by posing a threat to international peace. Therefore internationalization of human rights–namely creation and further rapid development of international human rights regulations–can be attributed to globalization. Fundamental rights previously set in national constitutions were elevated to the level of international obligations by international human rights regulations and later the range of these rights has steadily been extended: besides first and second generation of rights, a third generation is being debated nowadays. In the wake of the evolution of rights, the sphere of those eligible has also expanded. Today, rights protecting every human beings' freedoms are considered universal human rights, while their requirements of substance include not only the protection of certain freedoms, the restraint of the state from intervention, but also rights that require some kind of action from the state (the majority–but not exclusively–falling into the cluster of economic, social and cultural rights). What's more, beyond the relations between state and its citizen, demands to ensure human rights extend to involve relations between one citizen and the other.

There is even a cluster of human rights that not only became international as a result of globalization, but globalization has given birth to them. This latest cluster of so-called third generation human rights (in other words "solidarity rights[2]") is viewed by many as "human rights responses given to counter the challenges of globalization".[3] Today it is not clear which rights belong to this group and what exactly their real substance is. Examples are the right to peace as a counterbalance against arms race, the right to a healthy environment calling attention to the dangers of pollution, therefore the surge in the number of challenges of globalization is thickening the catalogue of third generation

[2] See Mavi, V.: Szolidaritási jogok vagy az emberi jogok harmadik nemzedéke? [Solidarity Rights or the Third Generation of Human Rights?] *Állam- és Jogtudomány*, 30 (1987–1988) 151–173. Viktor Mavi labels the newest generation of human rights to solidarity rights, signing their common background in the solidarity of the people and the nations.

[3] See Kardos, G.: *Emberi jogok egy új korszak határán* [The New Era of Human Rights]. Budapest, 1995.; Chapter II. Gábor Kardos defines the third generation of human rights which in his opinion are neither "rights" (since these have no subjective and their subject matter is not clear), and these nor create a generation of rights (since there is no adequate coherence between them) as a human rights response to global problems. Common in these rights the attemption to relocate, synthetize, and adopt the global challenges into the system of human rights.

human rights. Nowadays such rights are only in their early stages emerging as solutions to global problems, raising talk about the right to develop and the right to sustainable development.

These rights cannot be fully realized within the boundaries of one state, nor can they, or elements of them, be interpreted–or it is difficult to do so–as subjective rights of the individual against the state. On the other hand they must be considered when discussing individual rights: when the right to health is debated, the "right to a healthy environment" may also be taken into consideration.

The relationship between globalization and human rights and freedoms is not a one-direction route: just as globalization has had its effect on human rights (making some international, while bringing about others), they have affected globalization by making human rights universal and by human rights fostering globalization of civil society.

1. Universality of human rights

Universality of human rights and freedoms can be interpreted in several ways. Distinction may be made on the basis of the universality of forming norms, as well as the universality of their implementation.4 Creating norms of human rights under UN statutes is universal in the sense that all UN member states may take part in the debates leading to the wording of draft agreements. State approval of such norms, however, is a great deal less common, meaning a lot fewer states ratify them to be equally binding, while their universality further diminishes when we look at everyday practice or the implementation of those norms. Universality, therefore, applies to the creation of norms, but not to the realization and the respect of human rights.

Taking into account its philosophical background the universality of human rights primarily means that every human being regardless of race, sex, color, religion and any other belief, origin, wealth and so on is entitled to such rights independently from the region, country, social system they may live in. Since the idea of basic human rights emerged from Western ideological concepts of the 1700's (mainly that of enlightenment and natural law) and since regulations of Western and European legal systems are believed to be the most sophisticated representatives, other civilizations (mainly developing countries) frequently argue that human rights are products of the West and its cultural imperialism, thus aimed at nothing, but to impose Western cultural achievements and political

[4] See Van Reenen, P.: A Culture's Receptiveness for Human Rights: A Preliminary Sketch of a Conceptual Framework. In: *SIM Special*, No. 21. 591–608.

and social philosophies on Third World countries. Such countries commonly praise cultural relativism over the universality of human rights.

Tensions between universality and cultural relativism highlights the fact that besides globalization, symptoms of fragmentation are also present in international affairs. This is apparent in the relationship between universality and regionalism concerning human rights.

Globalization is driven by mutual interconnections, while enhancing them in the meantime. The principle of human rights being mutually interdependent is only one aspect as it is evident that human rights and various generations of human rights are linked so closely to one another that disregard for one of the rights deprives the benefits of another. It is equally important to point out that human rights cannot be thoroughly enjoyed in any corner of the world with mass human rights violations elsewhere. As the threat it poses to world peace may seem obvious, human floods of refugees often induce large-scale tensions "exporting" legal offences from the countries of origin. Recipient or target countries then come under enormous public pressure as social welfare systems become compromised, inhuman conditions in refugee camps make it to the headlines and acts of racism and intolerance become more and more frequent.

Such close links often manifest in the interaction of cultures. The western legal culture and human rights philosophies focus on individualism and historically argue in favor of rights rather than duties, whereas non-Western societies traditionally emphasize obligations to the community over individual freedoms. As a consequence of a better understanding between cultures, non-Western approaches may eventually acknowledge a new, complex set of individual choices and obligations and also Western philosophy may incorporate collective duties.[5] The impacts of Buddhism have already appeared in Western thinking as reflected in environmentalists' attitudes to the rights of future generations. The idea of collective duties towards the greater community is getting more attention as recognition of economic and social rights is established, although providing these rights remain the responsibilities of social solidarity (by for example means of social redistribution and NGO efforts). Western countries could serve as examples for successful adoption and vindication of economic and social rights alongside with civil and political principles. These examples prove that individual rights and freedoms–often labeled as creations of the West–can peacefully coexist with collective norms and accepting the value of individualism allows for reconciliation with the solidarity found among citizens. Of course, liberal views have long nodded at society's common

[5] See Pollis, A.: Towards a New Universalism; Reconstruction and Dialogue. *Netherlands Quarterly of Human Rights*, 16 (1998) 5–23.

boundaries of individual freedoms and acts; even the concept of social contract outlines rights to be valid within the community. Freedoms are not at all limitless in modern international law as it is clearly highlighted in human rights declarations: in the case of civil and political rights the interests of society and the need to protect the rights of fellow citizens justify certain forms of restrictions with various extent. Upon imposition of such limitations the countries' unique social and cultural features may also be taken into consideration.

Human rights universality does not contradict the idea of diversity among societies and cultures, as universality is never intended to mean uniformity.[6] Nor can it mean cultural uniformity, as human rights only draw a bottom line in the minimum conditions for individual and collective well-being.[7] Universality sets certain fundamental values inalienably entitled to all members of the human family based on their biological and social needs and musts. Such values include life (free of fear and suffering), basic health and human dignity. Human rights represent exactly these values, although their actual manifestation and effect may vary from one culture to another. Human rights philosophies have two principal cornerstones: prohibition of discrimination and tolerance that is respect for the rights of others. All in all universality should be viewed in the light of these two fundamental principles and values, as it tolerates every culture unless it ignores basic human rights–values treasured by an overwhelming majority of civilizations.

2. *The effects of economic globalization on human rights performance*

In general, globalization is attributed to the impacts of certain economic factors, namely the liberalization of market interests and world trade. Economic factors on the other hand have a great influence on attitudes to human rights. In the case of economic, social and cultural rights there is a more or less direct correlation as the state's capabilities to implement corresponding and necessary government actions are limited by its economic conditions. The concept is present in numerous international agreements, primarily in the Universal Decla-

[6] See Kuitenbrouwer, M.: Perspective on the Huntington Debate 574. In: *To Baehr in our minds: essays on human rights from the heart of the Netherlands.* Bulterman, Mielle 1998. *SIM Special*; no. 21.

Follows from the peculiarity of the international regulation of human rights that it does not aim to achieve uniformity since it is subsidiary and defines a minimum assumption of human rights.

[7] See Freeman, M.: Human Rights and Real Cultures: Towards a Dialogue on 'Asian Values'. *Netherlands Quarterly of Human Rights*, 16 (1998) 25–39, at 37.

ration of Economic, Social and Cultural Rights, allowing states to allocate dedicated resources within their financial limits. This close relationship works only in one direction though; hence protecting human rights requires a certain level of economic development, whereas high industrial output lacking further political will and action does not necessarily mean effective human rights responses. It is generally true that providing all the economic, social and cultural rights puts an enormous budgetary pressure on the state, although some rights of this sort, for example the right to form labor unions costs significantly less than others, of course practically even these expenses are pushed over to the private sector, mainly to business units as employers. Also true, that certain civil and political rights claim a bigger portion of the budget cake as does the court system enabling fair legal protection or the voting process in democratic elections–the costs of democratic institutions as a whole. With regard to mutual interconnection of human rights, the conclusion may be drawn that since the two major groups of freedoms can only be provided together with one another, there is a minimum level of economic development and resources essential for providing full-scale human rights coverage. Consequently, trade liberalization and integration, if healthy for economic growth, can have a positive impact on the realization of human rights.

Another aspect of the relationship between human rights and the economy is the way everyday human rights practices influence the economy. Deprivation of classic rights can in the long run lead to economic recession, as seen among the countries of the former communist block, market stability on the other hand–on both national and international level–presumes political stability, which in the end relies on a basic standard of civil and political rights conditions. Realization and practice of these rights have proved inseparable from those of economic, social and cultural rights; realization of one branch of rights requires respect for the other on the basis that neither of the branches is superior or more important (theory of mutual interdependence among human rights). A successfully completed economic liberalization gives way to new centers of public administration and decision making with clearly defined functions, eventually leading to political liberalization[8], and subsequently the new middle class can push for improvements in democratic standards.[9] Economic growth therefore triggers social demands for democratic rights, flawless human rights

[8] See Monshipouri, M.: The Muslim World Half a Century after the Universal Declaration of Human Rights: Progress and Obstacles. *Netherlands Quarterly of Human Rights*, 16 (1998) 287–314.

[9] See Huntington, S. P.: *A civilizációk összecsapása és a világrend átalakulása* [The Clash of Civilizations]. Budapest, 1998. 320.

conditions contribute to political stability, which as a result encourages investors fueling business growth after all.

Political studies found that long-term economic uphill favors degradation of traditional or material values (such as work, family, prestige) and a renaissance of postmodern, post-material values (such as democracy, human rights and protection of the environment). A value shift of this kind has frequently been a key factor in democratic consolidation processes in Latin America and Asia. The shift is by no means irreversible; following sudden economic downfalls even Western societies show signs of revaluation among historic and mundane achievements at the expense of democratic values.[10] The phenomenon serves as a bright example for inseparable and mutually interdependent human rights, equally important civil and political and also economic, social and cultural freedoms. Attention usually turns to certain abused rights as human life can only be complete with the full set of values represented in these human rights. Despite such an obvious relationship, economic and social rights are also known to boost tax rates and the price of labor thus holding back effectiveness and competitiveness, no wonder they are not so much welcome among corporate leaders. These issues can be alleviated by the world community's harmonized efforts to provide economic and social rights.

Competitive advantages resulting from an artificially low level of economic and social rights, often referred to as social dumping have previously stirred up resistance from international organizations. The struggle has always been a major driving force behind the development of, among other economic institutions of integration, the European Community and the World Trade Organization, promoter of worldwide quota liberalization.[11] For the very same reasons human rights aspects are starting to take hold in the activities and policies of international financial institutions – although in many cases confined to rhetorics only.[12]

Besides labor conditions, globalization has a rather negative effect on various aspects of human rights. Globalization has increased disparities regardless of anti-discrimination principles of human rights. Economic and social differences have always been there, globalization only made things worse. Social gaps and poverty are on the rise and globalization exclusively fruits for very limited

[10] See Kuitenbrouwer: *op. cit.* 572.

[11] WTO has already made some undertakings in this direction. See Farkas, O.: *Az Európai Unió szociális joga és szociálpolitikája* [Social Law and Social Policy of the European Union]. Szeged, 1998. 174.

[12] See Szentessy, K.: A Világbank és az emberi jogok [The World Bank and Human Rights]. *Acta Humana*, 16 (2005) 69–81.

fractions of the population, distinctions made on the basis of geographical location, income and language used in telecommunication. Urban and rural ways of life have come oceans apart and disparities in future prospects divide continents not only by the historic trenches between North and South, but within the developed world bringing more and more racial discrimination along. Particularly hard hit were women in the developing world: besides generally accepted achievements mass proportions of women's employment have resulted in thousands of underpaid women flooding suburban areas all over the developing world. Rootless, hungry and desperate, many end up as victims of prostitution or trafficking. Nevertheless, globalization is not always a direct cause of brand new human rights abuses, it has simply drawn excess attention to previously identified, but long ignored issues.[13] Well in line with the principles of global governance, these phenomena have come in the center of the attention of international organizations as essential elements of the making of political programs.

Globalization is not only a sum of consequences of business trends, but it is indeed influenced greatly by political currents. Market conditions are in the hands of politics and the rules of the game are constantly being shaped through power talks at both bi and multilateral round tables, such as at the World Trade Organization.[14] To identify political dimensions in globalization one has to simply remind of the growing number of ideas about global government, supporters proposing for extended UN institutional authority to cope with global issues.

Present institutions of the global governing system have in the past been selectively sensitive to global issues, most UN agencies have dealt with various aspects of development and globalization. Among others, the UN Development Program (UNDP) presses that strategic reforms in any economy must coincide with an appropriate social welfare policy able to withstand the negative effects of market forces. Its 1999 annual overview, the Human Development Report stressed out that the institutions of global governing system need to be reoriented in order to successfully maintain fairness during international negotiations.

[13] See Howse, R.–Mutua, M.: Protecting Human Rights in a Global Economy. Challenges for the World Trade Organization. International Centre for Human Rights and Democratic Development. http://www.ichrdd.ca/111/english/commdoc/publications/globalization/wtoRightsGlob.html

[14] See Oloka-Onyango, J.–Udagama, D.: The realization of economic, social and cultural rights: Globalization and its impact on the full enjoyment of human rights. Preliminary report to the Sub-Commission on the Promotion and Protection of Human Rights. UN Doc. E/CN.4/Sub.2/2000/13. http://www.unhchr.ch

Human rights institutions founded by the United Nations Charter (the Economic and Social Council, the Human Rights Council and its sub-commissions) often address different issues of globalization, however linked human rights bodies show less ambition in doing so. The majority of attention came from the Committee on Economic, Social and Cultural Rights. In May, 1998 the Committee turned to the World Bank, the International Monetary Fund (IMF) and the WTO to implement appropriate methods to probe real public impact on human rights brought about by their measures (social monitoring). The Committee declared: country reports are evaluated with respect to international economic policies, which greatly influence a state's capabilities to do her duties set forth by the Universal Declaration. In the general comment section of the right to food, the Committee addressed the issue of food safety affected by globalization, the responsibility of private organizations and the obligations of states to properly regulate private and corporate activities, and highlighted the stakes involved as international organizations must keep the right to food in mind while setting up policies and trying to enforce them.[15]

An exceptionally high amount of criticism hits international economic and financial institutions from human rights perspectives. Both World Bank and the IMF has on several occasions been charged with prescribing structural reform projects and shock therapy measures on state budgets, that significantly deteriorated the conditions in the population's economic and social rights. The WTO has been blamed before for its praise for trade liberalization and competitive advantages resulting from cheap labor. As an outcome, critics say, Labor Code minimums and social welfare standards decline, causing after all, or at least threatening with, downward-harmonization of a sort. In order to restore balance, industrial countries and labor unions have urged a so-called social clause to be annexed into trade agreements. These steps are not at all welcome among developing countries, who see it as covert protectionism of the developed. Studies conducted by international economic workshops on the other hand show that although some corporate decisions are actually based on exploitation-generated low cost advantages, poor or lacking Labor Code standards do not attract investments exponentially as many business entities anticipate social discontent and unrest along, not mentioning the emerging danger of customer boycott. Countless multinational corporations have set their own business policies containing additional human rights remarks, much encouraged by the governments of industrial nations in case of public procurement procedures for instance. Such initiations can easily confront WTO guidelines concerning procurement conditions and the elimination of technical

[15] *Ibid.*

trade obstacles, thus bringing WTO sanctions. To avoid WTO getting in the way of human rights vindication in the process of globalization, experts suggest promoting the principle of human rights primacy over any other contractual commitments in international law. And if free trade agreements are to be reconciled with human rights obligations, steps in human rights development will hardly clash with WTO regulations again.[16]

Besides certain conceptual issues, international economic and financial institutions receive complaints for their formal-organizational structure for ignoring human rights principles. Among the insufficiencies in the structure such as the dominance of developed countries and a marginal position of the developing part of the world in decision making procedures, operational defects are also believed to include lack of publicity and transparency and also unwillingness to consult with civil groups. One of the establishments that has gone farther than others on this way is the World Bank as it started listening to what civil societies have had to say and took up pioneering human rights conditionality (linking loan commitments to certain human rights conditions). The IMF is slightly behind as the Fund only made some progress in information availability and is yet to implement all other components of transparency and responsibility.[17]

During the struggle against the negative effects of globalization there is a growing consensus that besides states, international organizations and multinational companies should also be held accountable by the world community in order for more efficient human rights protection. It is now widely believed that states' mandates stretch further than their own international human rights obligations in respecting those rights, but they also need to compel all citizens and organizations within their jurisdiction to follow the course. At the present time the world community faces the unique challenge of multinational business activity, which thrives on all the economic benefits of globalization, while neglects any pressure to compensate for the disadvantages. All this is a result of their overwhelming economic power, which smaller states cannot even dream to be a match for, and bigger countries find it just as hard to exercise jurisdiction over business units of such mobility.

In order to keep transnational business activities within the boundaries of human rights, in 1999 the UN Secretary-General launched the Global Compact program intended to provide a reinforced framework for promoting

[16] See Allmand, W.: Trading in human rights: The need for human rights sensitivity at the World Trade Organization. International Centre for Human Rights and Democratic Development, http://www.ichrdd.ca/111/english/commdoc/publications/globalAllmand.html

[17] Oloka-Onyango–Udagama: *op. cit.*

cooperation between the international business community and the UN and to directly integrate the efforts of the corporate sector to comply with universal human rights norms. According to Global Compact, companies are to lay down business policies and internal ethics coherent with international human rights and labor law guidelines. The aim is to encourage corporations not only to implement respective working and employment conditions for their very own colleagues, but also to demand that subcontractors do likewise. They can incorporate policy restrictions to exclude investments targeting economic areas with disregard to human rights. Corporate giants have by now realized the need to take the lead as respect for human rights values has become crucial in improving production figures, too. Firstly, increasing consumer awareness puts the pressure on market competitors to guarantee their workers' basic human rights, as well as environmental and animal treatment minimums. Secondly, respect for underlying principles set forth in the Universal Declaration of Human Rights greatly contributes to the stabilization of a constitutional state, creating a more effective, more placid business climate. It is also more and more widely believed that staff members work better if contented, thus treated with respect and dignity. In investment target and trade partner countries promotion of human rights norms serves the best interests of the business sector as developed countries have lately been imposing trade sanctions on states with contempt for basic rights – sanctions obstructing free trade. Multinational companies hope for borderless business opportunities and open markets, however these features along with human rights conditions can be improved by sponsoring local welfare, healthcare and educational infrastructure or by disseminating the concept of human rights and supporting civil groups' efforts.[18] The International Labor Organization has a particularly important role in pushing transnational companies to follow such responsible practices, as the ILO's tripartite organizational and decision-making system ensure employers' interests and experience to be reflected in creating international norms. This way "volunteer law-abiding" of transnational organizations (although these norms are no more than soft laws) can better be guaranteed.[19]

There is growing demand for companies to demonstrate corporate social responsibility (CSR), which goes further than the usual state regulations. Socially

[18] See Business and Human Rights: A Progress Report. http://www.unhchr.ch/business.htm

[19] See Kaponyi, E.: A multinacionális vállalatokra vonatkozó szabályozási kísérletek, különös tekintettel az ILO és az OECD deklarációira [Attempts of Regulation Relating Multinational Corporations, with a Special Regard to the Declarations of ILO and OECD], *Acta Humana*, 16 (2005) 52–68.

responsible investments essentially mean that in accordance with the requirements of sustainable development, social, environmental and ethical aspects are also considered. Specialized institutions rate enterprises against non-economic criteria, and investors are invited to make their decisions based on these scores. In some cases even states support the use of this practice by requiring pension funds to declare their investment policies regarding social, ecological and ethical aspects.[20] Consequently, the conscious citizen sensitive to such aspects has a choice to make about which pension fund to opt for and what sort of investments to prefer.

3. *The role of human rights in the evolution of the organizations of global governance*

As mentioned earlier, several international organizations have made steps in order to adjust their activity to comply with human rights requirements. The long-anticipated reform of the United Nations aims at strengthening the human rights aspect of the solutions to global issues.

In March 2005 the UN Secretary-General submitted a report for the General Assembly on his proposals on how to tackle global issues facing the organization and the organizational reform necessary for any efficient remedies.[21] The Secretary-General offered a clustered analysis of the most urgent global problems and the required response from the side of the international community along the aspects of development, security and human rights, in other words the three freedoms: the freedom from want, the freedom from fear and the freedom to live in dignity. In connection with securing lives in dignity, a universal enforcement of the protection of human rights became the single most important task beside support for the rule of law and the establishment and strengthening of democracy. The Secretary-General acknowledged that despite the results of creating legal norms, implementation of such norms lacks real success. As a consequence, the authority of supervisory bodies monitoring human rights must be reinforced, as well as the roles of the human rights high commissioner and his or her office in preventing and solving conflicts and in supporting the establishment of national capacities of human rights institutions must be improved. During everyday practice it has become obvious that human rights aspects increasingly need to be taken into account in resolutions with

[20] See Brunczel, B.: A fenntartható fejlődés egy lehetséges forgatókönyve [A Possible Scenario of the Sustainable Development]. *eVilág*, 2 (2004) 13–15.

[21] See In larger freedom: towards development, security and human rights for all. Report of the Secretary General. Doc. A/59/2005.

impact on international peace and stability even in the Security Council, as the integration of human rights aspects ("mainstreaming human rights") on all levels of decision-making gains more and more attention. Demonstrating the growing importance of the human rights aspects and aims, the Secretary-General introduced a proposal to reform the Human Rights Council.

The founders of the UN went on to establish three committees in the line of the main UN organs: the Security Council, the Economic and Social Council and the Trusteeship Council. The last of the three has lost all of its functions, while the Security Council receives criticism over its anachronistic composition, making its organizational structure ever more ripe for reforms. According to the Secretary-General's proposal the seats of the Security Council must be reshuffled and expanded with respect to the principles of representativity and legitimity; the coordinative role of the Economic and Social Council must be strengthened throughout the world's economic decision-making procedures and development cooperations as well as in the dialogues and consultations with the organizations of the civil society; to the replace the emptied Trusteeship Council, a new Council of Human Rights will have to be created either as one of the UN's principal bodies or the as a support mechanism to the General Assembly. In contrast to the present Human Rights Council–left with eroded credibility as states have tended to struggle for membership not so much to promote respect for human rights, but rather to prevent their own human rights abuses from being discussed on the agendas or to point a finger at other states–the new Council would be a smaller and permanent organ, whose members could be elected for a definite period of time by a 2/3 majority of the General Assembly.

All in all, the Secretary-General's proposal aims at turning the UN into an international organization that does not watch mass scale human rights abuses silently, is able and willing to act to promote development, security and human dignity in order to achieve global freedom.

4. The human rights dimension of sustainable development

The main goal of sustainable development is promoting social welfare within the limits of the supportive capabilities of the environment. That means the concept of sustainable development can undisputedly be linked to the respect for economic and social rights. Keeping the principle of mutual interdependance in mind, these rights cannot be guaranteed without civil and political rights, therefore sustainable development involves the strengthening of democratic societies respecting civil and political rights.

It is a strong argument that among the criteria for sustainability and the basic principle of sustainable development, the requirement of subsidiarity is also present. As a result of globalization, the levels of decision-making are farther and farther from the individual, while the process of decision-making is becoming more and more obscure–leading to alienating people from public life and politics. The concept of subsidiarity, however, aims at rendering decisions back, closer to the levels accessible to people, self-governing systems of local communities must also be reinforced. When they get nearer to decision-making, people's perception of freedom as well as their sense of responsibility improve. The decision-making process relies on a cascade of negotiating interests on the levels of larger and larger community structures, and such negotiations ensure that various factors of sustainable development, different economic, environmental and social interests are considered and harmonized.[22]

In numerous aspects of life, globalization has impacted overall respect of human rights in a negative way, particularly by exaggerating inequalities. One of the aims of sustainable development is to eliminate such disparities. In the struggle against the negative effects of globalization, the role of the organizations of civil society and their international cooperation is increasing. Helping them in this struggle is the arsenal of essential tools provided by the development of information technology–one of the engines of globalization. The complete realization of human rights is therefore inseparable from sustainable development.

[22] See Gyulai I.: A fenntarthatóság értelmezése és megvalósításának feltételei [Interpreting Sustainability and the Conditions of Its Realization]. *eVilág*, 2 (2004) 8–12.

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RÉKA VÉGVÁRI*

Shifts in Thinking Concerning Law of Criminal Procedure in Witness Protection

Abstract. The essay deals with the new approach of criminal procedural law concerning witnesses. The witness protection problem has been in the center of academic discussion for the last two decades. The question has crucial importance within the European Union in light of the principle of mutual recognition. Acceptance of minimum standards in this field could facilitate the emergence of this corner stone of the judicial co-operation. The article provides an oveview on the efforts made in international and european level. Analyses the notion of witness and some principles of criminal procedure in connection with the witness protection. Finally it gives an insight into the hungarian regulation.

Keywords: Criminal procedure, procedural principles, witnesses, witness protection

Introduction

Although during the last thirty years a wider range of evidential tools have become available, witnesses have invariably had a key role in criminal proceedings. Witness statements are indispensable to the success of the investigation and the trial. The appearance as a witness on subpoena in front of the judicial authorities is generally an obligation of a person. Moreover, save in some circumstances listed in criminal procedural norms, making a statement is also mandatory, and in addition the witness is burdened by the obligation of giving a truthful testimony. Otherwise the witness has to face the consequences of a breach of this duty (perjury). Being a witness in a criminal case is not at all a comfortable position, not only for the above mentioned reasons.

Many factors have led to increased public attention on the role of witnesses in criminal proceedings. Perhaps the two most important issues have been the increased interest in the status of victims in criminal procedure and the signi-

* Research Fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H–1250, Budapest POB 25.
E-mail: rvegvari@yahoo.com OTKA T 046973.

ficant rise in terrorism and organised crime.[1] Over the last decade, intimidation by the parties to the case, and particularly of witnesses in the criminal process has become more and more frequent, and this has led to an increasing amount of allowing exceptions under legal norms for taking witness statements, for example, without the presence of the accused; or refusals in rendering incriminating testimonies. It is clear and recognised in the public debate that witnesses need protection. The main question relates to the 'know-how' of this protection, i.e. to questions such as what are the possible and most effective forms of protection.

Efforts in the Field of Witness Protection

States have recently given importance to the problem of witness protection at national, European and international levels. In the context of this paper "European level" includes the endeavours within the Council of Europe (hereinafter CoE) and within the European Union (hereinafter EU); the international level covers the work of United Nations (hereinafter UN).

European level

The first step was taken within the European Union by the adoption of the Resolution on the protection of witnesses in the fight against international organised crime of 23 November 1995[2] (hereinafter Resolution 1995). The Resolution on individuals who co-operate with the judicial process in the fight against international organised crime of 20 December 1996[3] calls on Member States to adopt appropriate measures to encourage individuals who participate or have participated in an association of criminals or other criminal organization of any kind, or in organized crime offences, to co-operate with the judicial process and to provide appropriate protection measures for any individual and, where necessary, for his parents, children and other persons close to him, who, by virtue of the individualá's willingness to cooperate with the judicial process, is or are likely to be exposed to serious and immediate danger; in considering such measures, Member States should have regard to the Resolution 1995.

[1] Mackarel, M.–Raitt, F.–Moody, S.: *Briefing paper on legal issues and witness protection in criminal cases.* Edinburg, 2001.

[2] OJ 1995 C327. 5.

[3] OJ 1997 C10. 1.

The Millennium Strategy[4] states that a proposal shall be prepared for an instrument on the position and protection of witnesses and of persons who participate or who have participated in criminal organisations, and who are prepared to co-operate with the judicial process by supplying information useful for investigative and evidentiary purposes or by providing information that may contribute to depriving criminal organisations of their resources or of the proceeds of crime. According to Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings,[5] each Member State shall ensure that victims have a real and appropriate role in its criminal legal system, and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings. It is necessary to ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances. Article 8. refers the victims rights to protection.[6]

The European Court of Justice adjudged in the Pupino case,[7] that "The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision".

[4] The prevention and control of organized crime: a European Union strategy for the beginning of the new millennium OJ 2000 C 124.1–33.

[5] 2001/220/JHA, OJ L 82, 22. 3. 2001. 1–4.

[6] 1. Each Member State shall ensure a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.

2. To that end, and without prejudice to paragraph 4, each Member State shall guarantee that it is possible to adopt, if necessary, as part of the court proceedings, appropriate measures to protect the privacy and photographic image of victims and their families or persons in a similar position.

3. Each Member State shall further ensure that contact between victims and offenders within court premises may be avoided, unless criminal proceedings require such contact. Where appropriate for that purpose, each Member State shall progressively provide that court premises have special waiting areas for victims.

4. Each Member State shall ensure that, where there is a need to protect victims–particularly those most vulnerable–from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles.

[7] http://curia.europa.eu/jurisp/cgi-bin; Judgment OJ C 193, 06. 08. 2005. 3.

The Institute for International Research of Criminal Policy, which is integrated into the University of Ghent, conducted a research on witness protection. As a result of the work three proposals for EU framework decisions were drafted: a proposal concerning anonymous witnesses,[8] a proposal concerning protected witnesses,[9] and a proposal concerning collaborators with justice.[10]

The Committee of Ministers of the CoE has adopted relevant recommendations in connection with the issue. Recommendation on the position of the victim in the framework of criminal law and procedure[11] proposes that whenever this appears necessary, and especially when organised crime is involved, the victim and his family should be given effective protection against intimidation and the risk of retaliation by the offender.

Recommendation on intimidation of witnesses and the rights of the defence [R (97) 13][12] is based on the awareness of the need for Member States to develop a common crime policy in relation to witness protection.

Recommendation on the protection of witnesses and collaborators of justice [R (2005) 9][13] declares inter alia as a general principle that appropriate legislative and practical measures should be taken to ensure that witnesses and collaborators of justice may testify freely and without being subjected to any act of intimidation.

International level

Measures for witness protection are provided for within the Statutes of the International Criminal Tribunal for the Former Yugoslavia (1993) and for Rwanda (1994) and also in the Rome Statute. It is the duty of these institutions to provide for appropriate protective measures. Rules of Procedure and Evidence both of ICTY and ICTR contain provisions on witness protection.

[8] Vermeulen, G. (ed.): EU standards in witness protection and collaboration with justice. 244–250. http://www.mruni.lt/

[9] *Ibid.* 258–268.

[10] *Ibid.* 251–257.

[11] Rec (85) 11 of the Committee of Ministers to Member States on the Position of the victim in the framework of criminal law and procedure, https://wcd.coe.int/

[12] Rec (97) 13E 10 concerning intimidation of witnesses and the rights of the defense, https://wcd.coe.int/

[13] Rec (2005) 9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, https://wcd.coe.int/

The Notion of Witness

European level

The European Convention on Human Rights (ECHR) does not contain a definition of witness; however, from the case law of the European Court a wide notion stands out. The Court has not given any specific wording but has defined the concept in an autonomous manner with a broad scope allowed for its application. The autonomous concept is mentioned in Kostovsky, and in Isgro judgements.[14] The R (97) 13 also uses a broad definition, namely, "witness" means any person, irrespective of his/her status under national criminal procedural law, who possesses information relevant to criminal proceedings. This definition also includes expert witnesses as well as interpreters. It covers those persons who have disappeared after making an initial statement, or who make statement only to the police.

The R (2005) 9 stipulates that "witness" means any person who possesses information relevant to criminal proceedings about which he/she has given and/or is able to give testimony (irrespective of his/her status and of the direct or indirect, oral or written form of the testimony, in accordance with national law), who is not included in the definition of "collaborator of justice". The definition as formulated by the Recommendation is based on the autonomous concept of witness under Article 6 of the European Convention on Human Rights. This definition includes any person who possesses relevant information to criminal proceedings about which he/she has given and/or is able to give testimony.[15] Here the function of the witness has main importance rather than the status of the person concerned or the form of the testimony. These factors could differ according to the national system. The expression 'relevant' covers all the information which is pertinent for the procedure, irrespective of the importance of the information. The element of importance should be connected to the evaluation of the protection needs, but not to the qualification of witness.

European Union

In accordance with the Resolution of the Council (1995) "witness" means "any person, whatever his legal status, who possesses intelligence or information

[14] Kostovski v. Netherlands Judgment of 20 Nov. 1989, Series A, No. 166, Applic. No. 11454/85, (1990) 12 EHRR 434; Isgro v. Italy Judgment of 19 Feb. 1991, Series A, No. 194-A, Applic. No. 11339/8.

[15] Explanatory Memorandum.

regarded by the competent authority as being material to criminal proceedings and liable to endanger that person if divulged". The resolution is connected to organised crime, and therefore it is understandable that the definition contains an element of threat.

The proposed framework decision on protected witnesses does not contain any general definition of witness. The proposal concerning anonymous witnesses presents a definition under which anonymous witness means "any person, irrespective of his status under national criminal procedural law, who provides or is willing to provide information relevant to criminal proceedings and whose identity is concealed from the parties during the pre-trial investigation or the trial proceedings though the use of procedural protective measures as specified in (...)".

International level

No definition of the witness can be found in international law. According to treaties, the case law and guidelines, parties giving testimony during the criminal procedure are included. Parties include witnesses in its classical meaning in most national laws, mainly victims and other vulnerable categories. Rules of Procedure and Evidence both of the ICTY and of the ICTR contain the definition of a victim, who is a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.[16] Rules of Procedure and Evidence of the ICC also defines the notion of victim.[17]

Hungarian law

In domestic law the Code of Criminal Procedure provides for a definition of witness. In accordance with section 79 subsection 1, any person can be questioned as witness, who may have information of the fact that must be proved. This is quite a broad definition of a witness to the crime; the members of the authorities giving testimony, the collaborators of justice, the eye-witnesses etc. are covered by it. According to Hungarian law and an accused and a co-accused give evidence still only in a position of an accused, not as a witness.

[16] Rules of Procedure and Evidence ICTY IT/32/Rev.39, Rule 2; ICTR ITR/3/Rev.1, Rule 2.

[17] Rules of Procedure and Evidence ICC Official Recordc ICC-ASP/1/3, Rule 85.

Procedural Principles and the Witness Protection Problem

Public hearing means that criminal cases are tried in an open court. There are two meanings contained in the concept of open trial. First, a trial is open when the public can attend the trial, and second, it can be regarded as open when the hearing is not open to public as such, but it is open to all of parties of the procedure. When a trial is conducted without public access, the principle of open court is infringed. However, it is important also to take into account the interests of the parties, and balance those interests against the public interest. In some cases the restrictions are necessary and fulfil the proportionality requirements, if the parties' interest and procedural rights are taken into consideration. The balance between the parties' rights and the interest of the public is secured by making the final court decision public.

When a trial is open for the public, serious problems may emerge, if the court orders the accused to leave the court room while the witness gives evidence, where there is a danger that his or her presence may influence the witness. Not only the principle of public hearing, but also the right to fair trial can be jeopardised. This limitation of the presence of defendant is justified, when it is necessary for protection of witness, but only when other guarantees counter-balance the absence of the accused.

The principle of oral hearing means that the trial itself is conducted orally. The possibility to provide for written witness statements has an impact of this principle. The accused's right to a fair trial corresponds to the right of an oral hearing where the court is faced with an obligation to search for the material truth.

Immediacy in the court trial is the leading principle of many systems of criminal procedure. At the court trial as a rule evidence must be produced on the basis of this principle. Using a statement of an anonymous witness as means of evidence is an important exception to the immediacy principle. In addition problems arise in connection with the principle of fair trial (R (97) 13). Furthermore, the case law of the European Court has given guidelines on how to deal with the problem. Using anonymous witnesses is not against the ECHR if proper guarantees are observed. These are:

– no convictions must be based solely or to a decisive extent on the anonymous statement,

– using anonymous witnesses must be exceptional,

– proper verification procedure is needed, where the credibility and reliability of the witness is examined and the examining authority shall have full knowledge of the witnesses' identity,

– the defence must have the right to challenge the alleged need for anonymity, of the witness, his/her credibility and the origin of his/her knowledge.

Until the last two decades the fair trial focussed almost only on the rights of the defence. The witnesses' rights were less discussed. Nowadays the importance of defence is recognised, and the procedural rights of witnesses are also accepted.

Witness Protection Measures in Hungary

Following the political transformation, an obvious change has ensued in the area of the protection of the witness. According to procedural law, a witness is under an obligation to appear and testify before the authorities upon summons. Apart from the prescription of obligations and their consequences, the state did not give attention for the proper protection of witnesses at all for a long time. It was at the discretion of authorities,–in the interest of spareing the witness the awkwardness of the situation–to make use of the modest opportunities guaranteed by law, such as the temporary removal of the accused from the courtroom or avoiding the confrontation by the parties. It is evident that the involvement of witnesses in criminal process cannot be omitted altogether; however, the risk entailed by giving evidence must also be minimized for witnesses. Appearance before the authorities and making a statement implies a stress situation in itself for the majority of witnesses. It is the duty of the state to protect those involved in the situation as much as possible from detrimental consequences or stress deriving from the situation, even if actual threat or undue influence does not exist.

So, as to accomplish the objectives above, the instruments of the protection of witnesses were gradually introduced. The protective measures that are available according to the Code of Criminal Procedure are as follows:

– non-disclosure of personal data,
– statement in a written form,
– legal counsel on the witnesses' side,
– exclusion of public during trial,
– temporary exclusion of defendant during trial,
– elimination of confrontation,
– witnesses under special protection (anonymous witness),
– direct personal protection,
– provisions on witnesses to be involved in a protection programme,
– pre-trial hearing in front of an investigating judge,
– giving evidence by means of live television link,
– restraining orders.

It was pursuant to Act 92 of 1994 that the management of the particulars of witnesses (with the exception of their names) was facilitated for courts acting *ex officio* or at the request on basis of classified materials.[18]

Within the purview of the new ACP, the rules of the protection of witnesses are specified under a separate title, which originally contained rules on the management of personal data as classified material, on the protection of special classes of witnesses, and on the protection of the person of the witness. It is prescribed that only in exceptionally moderate cases the name of the witness, which usually is classified information, is also admissible, confrontation between the accused and the witness can be disregarde, and the introduction for recognition shall be accomplished so that the person introduced for recognition cannot recognise or see the witness, if that is necessary *in re* the protection of the witness.

The introduction of the rules for the specially protected or anonymous witnesses was partly justified by the requirement for increasing the efficiency of intervention against organised crime. Thereby, a person exposed to danger will not have to appear at trial, since hearing shall take place during the investigation and it is conducted by the investigative judge in the absence of the accused and the defence counsel. The declaration of a specially protected witness shall be granted on the basis that the testimony concerns an essential circumstance of a significant case and the evidence provided by the witness cannot be obtained from another source. Measures taken to protect the witness are effective, since his identity shall not be known either by the accused or the defence counsel, and without such protection the witness, his relative or property would be exposed to a serious threat.

The procedure of the declaration on a specially protected witness shall be conducted by an investigative judge. Originally the ACP did not specify the so-called verification phase as part of the procedure, in the course of which the judge is able to verify the credibility of the witness and the circumstances relating to the credibility of his testimony. The elimination of this default was particularly essential, since according to Recommendation no. R (97) 13 a verification procedure involving an anonymous witness should be integrated into the criminal procedure to properly balance the objectives of judicature and the rights of defence. This would facilitate the defence's ability to challenge the necessity for anonymity, the credibility of the witness and the source of his information. A state that has not instituted the above-mentioned procedure will likely be regarded to infringe the rules of fair trail. In Hungary the problem was solved by enacting the Supplementary Law of 2002, which prescribed for

[18] It entered into force on 15th February, 1995.

the examination of the credibility of the witness and of his testimony as an obligation of the investigative judge.

The third form of protection is the protection of the person. Pursuant to amendments made in relation to the position of the accused, the defence counsel, the aggrieved or other party concerned, the representative of the aggrieved or other party concerned, or, the expert, the consultant, the interpreter, the official witness or any other person related to the afore-mentioned ones, are allowed for protection of the person. For its implementation, Government Decree no. 34 /1999 (II. 26.) formulated the conditions and rules for an order of protection of the personae involved in the criminal procedure and for officials participating in the process. The sphere of the statute encompasses also the personae of officials, prosecutors and judges. Furthermore, on the 1st of April 2002, Act 85 of 2001 on the Program of Protection of Parties (hereinafter APP) entered into force which included in the criminal procedure protection the supporters of the administration of justice, the objective of which is to guarantee protection for parties who are participating in the criminal procedure or actively support the administration of justice or are closely related to these persons, and, are threatened, and their personal security requires increased protection by the state. Its further objective is to promote the fight against crime, especially against infamous, primarily organised crime, and the effective enforcement of the interests of criminal prosecution and the administration of justice by the application of special measures adjusted to the extent of danger threatening the concerned party.[19]

Within the purview of APP, protection shall be guaranteed for those witnesses, aggrieved parties and offenders who are involved in criminal procedure and exposed to serious danger and who co-operate with judicature and repent.

[19] Framing the Act was motivated partly by the obligation of legal harmonisation entailed by accession to the EU and by the practice related to organised crime in the Member States. The statement of the Council of Europe of 1995 requires that Member States provide efficient and appropriate protection for witnesses preceding, during and following the criminal procedure. The majority of Member States provide protection for those in need in the scope of the program. This is also a solution adopted by Hungarian law. In the EU, this has become an indispensable prerequisite of co-operation against criminality, whence co-operation among Member States is accomplished by national departments implementing the program.

In December, 2000, Hungary signed the UN Convention against transnational organised crime. Its provisions concerning the protection of the witness promote the physical protection of witnesses, the removal of witnesses in danger, confidentiality of the particulars of witnesses, recourse to legislative and other measures that facilitate the arranging of video-conferences.

Under the new ACP, separate rules are stipulated *in re* witnesses and the accused whose identity has been changed as a consequence of their involvement in the Protection Program. These persons participate in the procedure with their original particulars; however, the headquarters of the Witness Protection Service shall be indicated as their place of residence.

Provisions promoting the witness protection are specified not only under the new ACP. The rules of hearing witnesses stipulate hearing children in exceptional circumstances; and they allow for the possibility of the provision of written testimony, the latter of which is subsequent to and following a verbal hearing. However, if necessary, the witness may be heard also subsequently to the provision of written testimony. These rules are strengthened by provision of a restraining order and the possibility for the application of closed-circuit broadcast at the session of the investigative judge or at the trial.

Although the rules on restraining orders are placed in sections concerning coercive measures, they also partly fall within the means of witness protection.

The increase in the effectiveness of intervention against violent crime committed within families has in recent years become a fundamentally important issue of criminal policy in Hungary, and this can be partly attributed to the impact of international trends.

A restraining order may be instrumental as to the impediment and evidence of the infringement of the law within families. Several international legal documents motivate states to institute rules on limiting, restraining and safeguarding family members, designed to assure both that the accused abandons the lieu of crime and the composure of the aggrieved party at least for a transitional period. The motioned provisions may be incorporated under administrative or penal rules.

Law-makers in Hungary have opted for the latter alternative by defining the restraining order as a coercive measure with regard to the rules of the prohibition of the abandonment of residence. This, as a solution, is still disputed in criminologist circles. The accused is forced to abandon the residence and area specified by court and to avoid both returning there for a specific period and making any contact with the person specified by court.

The shortest period for a restraining order is 10 days, and the longest period is 30 days; it is not possible to request for an extension. Nonetheless, the possibility of a repeated order is not precluded by law.

The rules are applicable on condition that there is a danger that the offender impedes, encumbers or jeopardises testimony *via* influencing or intimidating the aggrieved party. Therefore, a restraining order indirectly also promotes the objective of the protection of the witness. A deficiency in the new regulation is that it does not admit the application of a restraining order *in re* other

witnesses apart from the aggrieved party, whereas, in the testimony relating to a crime committed within a family, a crucial role is assigned to parties living in the specific neighbourhood and exposed to harassment by the offender outside their homes.

Summary

Expanding and developing the measures on witness protection are the pledge of effective international co-operation in criminal matters. The question of witness protection has extreme importance within the European Union in light of the principle of mutual recognition. Acceptance of minimum standards in this field could facilitate the emergence of this corner stone of the judicial co-operation. The concept of the witness protection should be interpreted broadly. It ought to cover not only the procedural and non-procedural means,[20] but also the treatment of witnesses from the side of judicial authorities. The first stage of the witness protection is the improvement of the treatment of persons giving evidence. Similarly to the proposal for a framework decision on certain procedural rights applying in proceedings in criminal matters throughout the European Union,[21] a letter of rights should be given for all witnesses or open it up for them. The trust towards the judicial authorities should be strengthened.

The definition of witness should be clarified on EU level. Witnesses' right to give evidence without intimidation and threat should be declared. Proportionality between the nature of the protection measure and the seriousness of the intimidation of the witness should be ensured. Certain minimum procedural protection should be given to every witness. In case of serious criminal offences the right of appointed legal representation should be ensured for the witness. With regard to witnesses in weaker position, e.g. children, special protective measures should apply.

The problem of anonymous witnesses should be reconsidered in connection with the principle of fair trial. Legal representation of the defendant during the verification procedure should be ensured.

[20] Non-procedural protection means the safeguarding of witnesses who are in danger or directly threatened, and where the application of the procedural tools are not effective per se.

[21] COM/2004/0328.

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ÁDÁM BOÓC *

The Reform of the Legal Regulation of Arbitration in Austria with Special Emphasis on the Appointment and Challenge of Arbitrators

Abstract. This study deals with some particular features of commercial arbitration in Austria. The legal framework of arbitration in Austria was changed with an effect of 1st July, 2006, as the Austrian Parliament passed the *Schiedsrechts-Änderungsgesetz* 2006 in December 2005. This act was proclaimed on the 13th January 2006 and entered into force 1st July in spite of the planned date of 1st January. After having described the significance of arbitration in Austria the author pays special attention to the topic of appointment and challenge of arbitrators. The author compares the rules of the valid Austrian act with the provisions of UNCITRAL Model Law adopted on 21st June, 1985. The author highlights some cases from the legal practice which are considered relevant in the present issue. Finally the author summarizes the provisions of the rules of procedure of International Arbitral Centre of the Austrian Federal Economic Chamber from the point of view of appointment and challenge of arbitrators, which rules have been effective also since 1st July, 2006.

Keywords: arbitration, international arbitration, Austria, appointment and challenge of arbitrators.

I.

The settlement of legal disputes in Austria by arbitration looks back to a long past. It is not only the domestic arbitration, which possesses significant traditions in Austria but the place of numerous international commercial arbitration proceedings is also Austria, and respectively Vienna.[1] Of course the role of Austria and its capital deserves to be accentuated in the field of international commercial law as well. From the aspect of our subject we have to refer before all to the organization of UNCITRAL, Vienna, furthermore to the International

* Junior Research Fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014, Budapest, Országház u. 30., Hungary
E-mail: adambooc@hotmail.com

[1] In relation to earlier Austrian domestic and international arbitration regulation see: Fasching, H. W.: *Schiedsgericht und Schiedsverfahren im österreichischen und im internationalen Recht.* Wien, 1973.

Arbitral Centre of the Austrian Federal Economic Chamber (*Das Internationale Schiedsgericht der Wirtschaftskammer Österreich*).[2]

International commercial practice esteems Vienna as a well-known seat of arbitration along with several other cities–e.g. Paris, Stockholm–, and this sort of psychological circumstance provided that contracting parties often do choose Vienna as the court of arbitration.[3] The people's democratic states with socialist systems have been also stipulated Austria as the place of arbitration, the reason for this can be identified in the traditional political independence of Austria.[4] According to the survey conducted in the 1980's on the arbitral practice of the International Chamber of Commerce, Paris (ICC) with the examination of 90 cases it has been determined that also in the cases of the ICC companies from both Eastern and Western Europe had chosen the law of Austria 9% of the cases and Austria as the place of arbitration 7% of the cases.[5] We have to regard these numbers as significant in the light of the fact that the ICC has its seat in Paris and therefore the place of proceedings of international arbitration is in most cases Paris.

In the era of socialism the Austrian arbitral practice had played a significant role in Hungarian business life, as well.[6] Numerous Hungarian companies had stipulated the jurisdiction of the Austrian Federal Economic Chamber in their foreign trade contracts.[7] At this point we cannot avoid to mention the 1982 cooperation agreement on the field of commercial arbitration concluded between the Austrian Federal Economic Chamber and the Hungarian Chamber of Commerce and Industry (formerly known as Hungarian Chamber of Commerce). The first amendment to the cooperation agreement was made in 1990 and its text currently in force was determined 11th June 1998. This agreement allowed

[2] In relation with the centre of UNCITRAL in Vienna see: www.uncitral.org. In relation of the Court of Arbitration attached to the Austrian Federal Economic Chamber–which court of arbitration we will investigate in detail later on–see: www.wko.at/arbitration.

[3] See also: Berger, K. P.: International Economic Arbitration in Germany: A New Era. *Arbitration International*, 8 (1992) 103.

[4] See: Melis, W.–Strohlbach, H.: East-West Arbitration. In: Sanders, P. (ed.): *Yearbook of Commercial Arbitration*, VII (1982) 403.

[5] See: Third Seminar on East-West Arbitration: (Paris, December 6–8, 1983) *Journal of International Arbitration*, 1 (1984) 85–86.

[6] On Middle and Eastern European arbitration in general see: Horváth, É.: Választottbíráskodás Közép- és Kelet-Európában (Arbitration in Middle and Eastern Europe). *Külgazdaság Jogi Melléklete*, 4 (1994) 49–59.

[7] See: Leloczky, K.: East-West Arbitration: A Practitioner's Viewpoint from Hungary. *Arbitration International*, 4 (1988) 267.

arbitral proceedings between Austrian and Hungarian business organizations by the application of the UNCITRAL sample code of conduct. The agreement includes a sample arbitration clause, as well, which stipulates the appointment of one or three arbitrators. From the aspect of our subject the appointing body in the agreement has an emphasized significance, since in the statement of claim shall be filed to the appointing body and also this body will proceed in the appointing of the arbitrators as well. According to the agreement, in the case the dispute arises between parties with seats in Austria and Hungary, and the claimant–or counter-claiming defendant–has its seat in Hungary, the Federal Chamber in Vienna shall be the appointing body. In case the the claimant–or counter-claiming defendant–has its seat in Austria, the Hungarian Chamber of Commerce and Industry shall proceed. In case parties with seats in Austria or Hungary have a legal dispute with a person of any kind from a third country, the president of the Federal Economic Chamber in Vienna shall be the appointing body if one of the parties' seat is in Austria, furthermore the president of the Hungarian Chamber of Commerce and Industry shall proceed in the appointment if one of the parties have its seat in Hungary.[8]

From the aspect of the appointment of the arbitrators Article 3 of the agreement deserves special attention according to which the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry and the Arbitral Centre of Austrian Federal Economic Chamber owns one common list of arbitrators, onto which each party may designate up to 21 persons eligible for the arbitrator's position, of whom 7 should be neither Austrian nor Hungarian citizen. This list is obligatory for the appointing body, yet it is only recommendatory for the parties to the dispute, however only persons who signed the arbitral contract attached to the agreement may act as arbitrators.[9] The provision in connection with the arbitrator's nationality has a significance in order to guarantee the impartiality and independence of the proceeding persons, moreover it is for the same reason that the appointment is divided as written above between the two chambers.

The agreement concluded in 7th September 1984, Vienna does also provide support for the significant role of the Austrian arbitration during the 1980s. This agreement–which was created in a five year period of preparation and harmonizing–with the help of the recommended arbitration clause allowed American and Hungarian companies and enterprises to designate Vienna as the

[8] For more on this see: Horváth, É.–Kálmán, Gy.: *Nemzetközi eljárások joga – A kereskedelmi választottbíráskodás* (Law of International proceedings–Commercial Arbitration). Budapest, 2003. 139–140.

[9] For the text of the Agreement visit: http://www.mkik.hu/index.php?.id=54.

place of proceedings and the arbitral rules of UNCITRAL (Arbitration Rules of the United Nations Commission on International Trade Law, UNCITRAL Rules) as the law of procedure. From the aspect of our subject it deserves special stressing that in accordance with the clause, in case the parties cannot agree on the appointment of the arbitrators, the chairman of the arbitral centre of the Austrian Federal Chamber shall appoint the arbitrators, from a list collectively set up by the American Arbitration Association and the Hungarian Chamber of Commerce. On this list one can only find highly reputable judges and attorneys of different nationalities who were not coming from either the United States or Hungary. This provision served the assurance of the independence and impartiality of the arbitral body. The optional appliance of the recommended clause can be described as a significant element of the agreement, thus parties could agree on other kinds of arbitral arrangements.[10]

The principle rules of arbitration in Austria can be found among rules providing on standard civil procedures–similarly to some other European legal systems, like that of Germany.[11] The Austrian law on civil procedures, the Code of Civil Procedure, the *Zivilprozessordnung* (hereinafter referred to as ZPO) entered into force 1st January 1898.[12] The introduction of the ZPO was taken care of by the *Einführungsgesetz zur Zivilprozessordnung* (*Gesetz vom 1. 8. 1895 betreffend die Einführung des Gesetzes über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten*) adapted on the 1st August 1895. The first significant reform of the rules of arbitration was carried out by the 1983 civil procedure novella. Before this only one editorial correction had been made in 1929 in relation with Paragraph 3 of Article 583.[13] In the preparation of the reform of 1983–which carries the name *Zivilverfahrens-Novelle 1983*–

[10] See: American Arbitration Association, Hungarian Chamber of Commerce and Federal Economic Chamber of Austria: Signature of New Agreements to assist Trade Between the United States and Hungary by Providing for Arbitration in Vienna, Vienna, September 7, 1984. *Journal of International Arbitration*, 1 (1984) 369–370.

[11] It should be noted as well that respectively up to the 2006 reform of the Austrian arbitration law the laws on the jurisdiction and competence of courts of common pleas had had a great significance too. (*Jurisdiktionsnorm – Gesetz vom 1. 8. 1895 über die Ausübung der Gerichstbarkeit und die Zuständigkeit der ordentlichen Gerichte in bürgerlichen Rechtssachen.*)

[12] For a overview regarding the ZPO see: Fasching, H. W.: *Zivilprozessrecht*. 2. ed. Wien, 1990; Fasching, H. W.–Konecny, A.: *Kommentar zu den Zivilprozessgesetzen*. 2. ed. Vienna, 2003; Rechberger, W. H.: *Kommentar zur ZPO*. 2. ed. Wien, 2000.

[13] For this see: Liebscher, Ch.–Schmid, A.: Arbitration Law in Austria. *Journal of International Arbitration*, 16 (1999) 25.

Prof. Iván Szász has played an important role which activity was met with great acknowledgement in Austria.[14]

It is vital to pay attention to the year of the procedure amendment which has made among others even the conclusion of the arbitration contract easier,[15] since it precedes the UNCITRAL Model Law of 1985. As a result of that, this amendment could not have taken into account the provisions of the Model Law, thus the development of the Austrian arbitration practice had avoided background regulations based on the UNCITRAL Model Law till the year of 2006. According to the opinion of some authors, this Austrian arbitration regulation has adjusted itself only moderately to the demands of international arbitration procedures.[16] Other authors think that even this Austrian amendment has been created to keep pace with the significant development of the international arbitration after World War Two.[17]

At the same time, the significant American expert, Gary B. Born has the standpoint that this Austrian body of regulation assures the accomplishment of arbitration contracts and the enforcement of the arbitral awards in the appropriate way, furthermore it is also important that the interference of state judicial bodies stays only minimal.[18]

Taking into account the abovementioned the reform of the Austrian arbitration law presented an ever urging demand in the 1990s, the main goal of the reform being the accommodation to the compliance with the provisions of the UNCITRAL Model Law. In 2000 *Prof. Walter H. Rechberger* from Vienna proposed that the *Ludwig-Boltztmann-Instituts für Rechtsvorsorge und Urkundenwesen* Institute which was led by him shall set up a workgroup dealing with the reform of arbitration law. The task of this workgroup was to create a draft resolution for part six of the ZPO that contained the arbitration rules. The leader of the workgroup was *Prof. Paul Oberhammer* from Zurich. Experts from the areas of both practice and theory of arbitration took part in the workgroup. The draft on the reform of the arbitration rules was presented to justice minister *Böhmdorfer* in 2002 under the title *Entwurf eines neuen Schiedsverfahrens-*

[14] See: www.ssd.com/files/tbl_s10News/FileUpload44/12373/Szasz.pdf .

[15] See: Niklas, M.: Schiedsverfahren via Internet. Juristische Möglichkeiten der Verfahrensabwicklung via Internet nach der ZPO. http://www.rechtsprobleme.at/doks/internet-schiedsverfahren-niklas.pdf 2.

[16] Regarding this see especially: Herrmann, G.: The UNCITRAL Model Law–Its Background, Salient Features, and Purposes. *Arbitration International* 1 (1985) 9.

[17] For this see: Lionnet, K.: The UNCITRAL Model Law. A German Perspective. *Arbitration International.* 6 (1990) 344.

[18] See: Born G. B.: *International Commercial Arbitration. Commentary and Materials.* 2. ed. The Hague–Boston–London, 2001^2. 147.

rechts. According to the ministerial motion the goal of the reform was that Austria became an even more attractive seat of arbitration.[19]

The adoption of the draft statute however needed more time. The third official version dates 18th October 2005. The Austrian Parliament passed the *Schiedsrechts-Änderungsgesetz 2006* in December 2005 and which was proclaimed on the 13th January 2006 and entered into force 1st July in spite of the planned date of 1st January.[20]

The new arbitration set of rules can be found in Art. 577–618 of the ZPO and includes ten parts: General Rules (*Allgemeine Bestimmungen*), Arbitration contract (*Schiedsvereinbarung*), Setting up the arbitral tribunal (*Bildung des Schiedsgerichts*), Jurisdiction of the Arbitral Tribunal (*Zuständigkeit des Schiedsgerichts*), Conduct of the Proceedings (*Durchführung des schiedsrichterlichen Verfahrens*), Arbitral Award and Termination of Proceedings (*Schiedsspruch und Beendigung des schiedsrichterlichen Verfahrens*), Legal Remedy against the Award (*Rechtsbehelf gegen den Schiedsspruch*), Recognition and Enforcement of the Arbitral Award (*Anerkennung und Vollstreckung von Schiedssprüchen*), Special Provisions (*Sonderbestimmungen*).[21]

The unified set of rules, that is relating to international and domestic arbitration cannot be considered only as the amendment of the existing legal regulations. According to *Walter H. Rechberger* the new statute is a complete revision of the Austrian arbitration rules based on the UNCITRAL Model Law. In the opinion of *Rechberger* the provisions of the Model Law were not taken over on a full scale, the Austrian act do follow party different solutions from the Model Law, furthermore in the course of the preparation of the draft reform, numerous foreign bodies of law had been considered as well–thus for example the arbitration laws of Switzerland, England and France.[22] Nevertheless Austria can be considered as a Model Law Country from the date of 1st

[19] „*...die Stellung Österreichs als Schiedsort noch attraktiver zu machen.*" (to make the status of Austria as place for arbitration more attractive). For the preparation of the reform of the arbitration see also: W. H. Rechberger: *Einführung in* das neue österreichische Schiedsverfahrensrecht. In: http://www.iwp.or.at/veranstaltungen/unterlagen_2006_03_21.pdf 3.

[20] Cf.: Baier, A.–Trofaier, M. T.: Austria. In: Rowley, J. W.–Mendelsohn, Mc. B. (ed.): Arbitration World. *Jurisdictional Comparisons*. London, 2006[2]. 18.

[21] These special provisions refer to arbitral proceedings between the undertaker (*Unternehmer*) and the consumer (*Verbraucher*) Par. (1) of Art. 617 provides on a theoretical level that in relation with the undertaker and the consumer an arbitral contract may be concluded validly only in existing legal disputes.

[22] See: Rechberger: *Einführung in das neue... op. cit.* 4–5.

July 2006 from the point of acts on arbitration since the Austrian arbitration rules are based on the Model Law–similarly to many other legal systems.

II.

Art. 586–591 of Capital 3 of Part 6 of the ZPO (*Bildung des Schiedsgerichts*)[23] provides on the setting up of the arbitral tribunal, the nomination and challenge of arbitrators, the reasons for challenges, which provisions we analyse in detail further below, with the comparing to the older regulation and the stipulations of the Model Law.[24] We will also refer to some cases arisen in the practice in relation of the nomination and challenge of arbitrators.[25]

According to Art. 586 of the ZPO in force parties may agree upon the number of arbitrators freely. In case parties nominate an even number of arbitrators, the arbitrators shall nominate one other arbitrator who will preside of the tribunal. In case parties do not agree otherwise, the number of arbitrators shall be three. This regulation is different from earlier rules and to some extent from the Model Law, as well. The earlier regulation had not contained provisions on the odd number of arbitrators, that is there were no such provisions as a further arbitrator shall be nominated by the arbitrators if they were appointed in an even number.[26] Evidently, this question has an importance from the viewpoint of the ability to decide of the tribunal. According to Par. 1 of Art. 591 of the invalidated ZPO, in case a majority of votes cannot be achieved, moreover in case there two arbitrators no agreement can be reached, then this fact shall be disclosed to the parties.

[23] It is noteworthy that the title of Capital 3 is rather deceptive since the word *Bildung* means creation yet this same capital contain the rules of challenges of arbitrators as well. This system does correspond with thee terminology of the UNCITRAL Model Law, Capital 3 thereof deals with the setting up of the arbitral tribunal (*Composition of the Arbitral Tribunal*), as well.

[24] For an overview of the new Austrian arbitration law see: Liebscher, Ch.: *The New Arbitration Act 2006. Text And Notes.* The Hague, 2006; Zeiler, G.–Steindl, B.: *The New Austrian Arbitration Law. A Basic Primer.* Wien–Graz, 2006.

[25] With respect to the fact that the later arbitral rules entered into force 1st July 2006, the cases obviously relate to the application of the former set of regulation.

[26] Art. 580 of the invalidated ZPO provided that in case parties did not stipulate on the number of arbitrators in the arbitral contract, nor appointed any arbitrators, then both parties were entitled to nominate one arbitrator and the thus elected arbitrators would appoint the chair of the tribunal.

In accordance with Par. 2 of Art. 591 if Parties did not stipulate any provisions for this case neither in the arbitration contract nor in later written agreements, then any of the parties are entitled to request the otherwise competent (due to the lack of the arbitration clause) state court of justice to determine the invalidity of the arbitration contract or to pronounce that it is invalid in the actual case. It is clear that this older rule could pose a obstacle to a successful arbitration procedure, since in case both parties do nominate only one arbitrators, and the arbitrators could not reach an unanimous decision, then the whole arbitration contract would be invalid and with this, the possibility of the settlement of the case by way of arbitration would be terminated, too.

It should be noted that the Model Law provides only as much as that parties may determine the number of arbitrators freely. Although at the time of the creation of the Model Law there were conceptions on that in the event parties do not determine the number of arbitrators, with the help of a supplementary rule the even number of arbitrators could be avoided. However the final version of Par. 2 of Art. 10 of the Model Law stipulates that if parties cannot agree upon the number of arbitrators, three arbitrators shall proceed in the case.[27]

From a comparative legal point of view we should note that while the Austrian law provides that if parties nominate an even number of arbitrators, the tribunal–for the sake of decisions-making–actually co-opts itself, the Québec Code of Civil Procedure in force since 11th November 1986 which was revised 1st August 2004 and based on the Model Law, does not give such freedom to the parties. According to Art. 941 of the Québec Code of Civil Procedure three arbitrators should compose the tribunal. The text presumes two litigant parties, since it provides that each party shall nominate one arbitrator, and the thus elected arbitrators shall nominate the president of the tribunal.

Art. 587 of the ZPO contains the rules of the nomination of arbitrators. Paragraph 1. includes the principal rule that parties may agree freely upon the arrangements of nomination of arbitrators. It is a significant difference from the provisions of the Model-act that the Austrian law–contrary to Par. 2 Art. 11 of the Model-act–does not include the principle that if not otherwise provided by the parties none shall be excluded on the base of her nationality to proceed as arbitrator.

In case the parties cannot reach an agreement on the nomination of arbitrators, the ZPO's supplementary rules shall apply. In case of a sole arbitrator, the parties cannot agree upon the person of the arbitrator, after the delivery of notice of the arbitral centre the centre will appoint this arbitrator if this requested by

[27] See: Binder, P.: *International Commercial Arbitration and Conciliation in Model Law Jurisdictions*. London, 2005[2]. 103.

either party. In case an arbitral tribunal proceeds, each party shall nominate one arbitrator and these appointed arbitrators shall nominate the chair of the tribunal. In case more than three arbitrators shall proceed, then each party is entitled to nominate the same number of arbitrators, and the thus elected arbitrators shall elect the chair of the tribunal.

Point 4 of Par. 2 of Art. 587 of the ZPO contains a four-week-long deadline. In case any of the parties do not fully comply with the obligation to nominate the arbitrators within four weeks upon receipt of the written notice serving for this end, or the arbitrators cannot elect the arbitrator to be co-opted within four weeks, then upon request the ordinary state court of justice shall be entitled to appoint this arbitrator. In case the parties agreed upon special procedures on the nomination of the arbitrators, and any of the parties, the arbitrators, or the electoral body–for example an arbitral institute–breaches these rules, or the parties cannot reach and agreement within this special procedure, upon request of any of the parties the state court of justice shall be entitled to appoint the proceeding arbitrators. Thus the supplementary rules of the ZPO apply not only if parties altogether cannot agree on the nomination of arbitrators, but also in case parties stipulate a special procedure to this end, but for some reason the appointment of the arbitrators does not come to end.

It is an important question whether there are any limits to the freedom of the parties in the nomination of arbitrators. The rules of the ZPO–following the provisions of the Model Law–expressly stipulates that parties may agree upon the rules of procedures freely. It can be concluded from the other provisions of the ZPO–and of the Model Law–and it is also supported by legal literature that the nomination procedure determined by the parties cannot breach the minimum requirements of impartiality of arbitrators, moreover they cannot serve as a reason to the contestation of the arbitral award upon ground of the constitution of the tribunal. [28]

(This can be thus recognized as a limit to the freedom of the parties in connection with the procedures of nomination of arbitrators.) Otherwise the regulation would be inconsistent, since in principle it would then allow a procedure which later on would allow the exclusion of arbitrators, or the invalidation of the arbitral award.

In accordance with Point 5 of Par. 1 of Art. 587 of the ZPO the party shall be bound by the arbitrator who was nominated by her after the time the other party received the written notice on the nomination of this arbitrators. (The Model Law does not include such rule.)

[28] See: Power, J.: *The Austrian Arbitration Act. A Practitioner's Guide to Sections 577–618 of the Austrian Civil Procedure*. Vienna, 2006. 28.

The Model Law grants a 30 day period to nominate the arbitrators, while the earlier Austrian regulation provided only a significantly shorter, 14 days period in Par. 1, Art. 581 of the ZPO previously invalidated. Although the new arbitration law requires written nominations, the earlier act was somewhat stricter in accordance with formal requirements. Par. 3 of 581 of the invalidated ZPO provided that the notice on the nomination of arbitrators shall be delivered by post or by notary public to the other party. This proceeding is a must in the case of an oral notification on the person nominated as well since the regulation requires written notifications.[29] This is important because the other party will be in a confirmative position that she is able to make her remarks, objections regarding the person of the nominated arbitrator only after the receipt of the written notice. It is a significant part of the Austrian legal practice that Art. 581 of the older ZPO shall not apply case the arbitration contract expressively determines the name of the arbitrators.[30]

Art. 582 of the earlier ZPO allowed the courts of justice to appoint arbitrators in an unappealable decision in case the parties do not nominate the arbitrators. In accordance with Par. 1 of Art. 583 of the older ZPO parties were required to nominate arbitrators jointly and no agreement were reached in this matter, any of the parties were entitled to request the state court of justice to declare the arbitral contract null and void. The same could be requested if the arbitral contract included the arbitrators by name and any of these arbitrators passed away, were excluded or denounced to proceed in the case, or otherwise failed in performance of her obligations.[31] Since the former Art. 579 of the ZPO provided that noone is obliged to accept her nomination to the arbitrator's position. For an important reason one could retire from the tribunal even after the acceptance of the nomination.

It should be emphasized that the Austrian legal practice stressed the private legal nature of the legal relationship between the arbitrator and the nominating party and the arbitral contract as well.[32] According to a legal case arisen in practice, the arbitral contract enters into force between the arbitrators and the parties only when the arbitrators are appointed and they have accepted the

[29] For this see: Fasching, H. W.: *Kommentar zu den Zivilprozessgesetzen*. Wien, 1971. 761.

[30] See: EvBl 1959/362 (SZ 32/109). Quoted by: Stohanzl, R. (Hrsg.): *Zivilprozessgesetze*. Wien, 2002[9]. 563.

[31] It should be noted that only in case the arbitrators were nominated in the arbitral contract would be the later group of cases, namely the death of the arbitrator, her denouncement, denial or delay to comply with her obligations were enough grounds to declare the invalidity of the arbitral contract.

[32] See: Stohanzl: *op. cit.* 562.

nomination and from this aspect the nominator person to the arbitrators are irrelevant.[33]

According to Par. 3 of Art. 583 of the old ZPO in case the arbitral contract was concluded in connection with all and every legal disputes arising from the given legal relationship, and the reason because of which the arbitral contract shall be invalidated does not exclude that disputes in the future will be decided by way of arbitration, the court of justice is entitled to pronounce in its verdict the arbitral contract to invalid only in the given case. In the pertinent practice the verdict of court will invalidate the arbitral contract and not the invalidation of its performance–by the reasons given in detail above. At the same time, the arbitral agreement will be invalidated *ipso iure* in case the arbitral institution designated in the agreement will be closed down by way of a change of law.[34]

It is clear that by the above mentioned old rules of the ZPO it was relatively easy that by difficulties of the nomination of or by problems with the arbitrators, the arbitral contract would be invalidated, that is the possibility of enforcement of one's rights by way of arbitration would be terminated. It should be noted that these rule–on grounds of the old Art. 585. of the ZPO–are permissive in their nature, which means that parties may deviate from them in the arbitral contract or in later written agreements by mutual consent.[35]

Par. 4 of Art. 587 of the ZPO currently in force contains a somewhat special provision which cannot be found either in the Model Law or in the German civil procedural act which was taken into consideration during the preparation of the Austrian rules. This provision states that one has to determine what kind of claim and on what arbitral contract is about to be enforced in the written notice on the nomination of the arbitrator.[36] Although in practice one can find in many cases even without this rule references to the content of the legal dispute in notices on the acceptance of the nomination, this rule can be practical when there are more arbitral contracts between the parties. According to the practice, this rule should not be interpreted over-extensively. It could be

[33] See: OGH 28. 04. 1998 (253/97). The legal case can be found at www.kluwerarbitration.com/caselaw.

[34] See: SZ 21/66, EvBl 1996/130 (SZ 69/773). Quoted by: Stohanzl: *op. cit.* 565.

[35] It is expedient to refer to the text of Art. 591. of the old ZPO according to which if the arbitrators could not reach a decision, the parties had to be notified, who could request the court of justice to invalidate the arbitral contract.

[36] See: ZPO 587. § (4): *Die schriftliche Aufforderung zur Bestellung eines Schiedsrichters hat auch Angaben darüber zu enthalten, welcher Anspruch geltend gemacht wird und auf welche Schiedsvereinbarung sich die Partei beruft.(The written application for the appointment of an arbitrator must also state which claim is being asserted and on which arbitration agreement the party is pleading.)*

enough that the type of the claim, moreover the legal relationship on which the claim is based will be described, furthermore it is also satisfactory, if there are references to the document containing the arbitral contract.[37] In my opinion the designation of the type and nature of the claim can be relevant because they can affect the party in which arbitrator she will appoint

Par. 6 of 587 of the ZPO contains a subsidiary rule, stating that the court of justice may appoint an arbitrator upon the request of either party in the case the nomination of the arbitrator does not come to pass within 4 weeks upon the receipt of the notice by any other reason not discussed above, moreover if within a reasonable period of time the parties fail to nominate the arbitrators according the nomination rules set out by themselves. This subsidiary rule reflects presumably the affections of the new French Code of Civil Procedures, Par. 2 of Art. 1493 thereof contains a similar solution.

Although also the Model Law contains the provision, that either party is entitled to turn to the court of justice or other competent authority if parties did not agree upon the nomination of the arbitrator, moreover if the appointment procedure stipulated by the parties proved to be unsuccessful, the Model Law does not allow the approach of courts of justice in case the procedure agreed upon by the parties does not end successfully in a reasonable time.

To define the term reasonable time–*angemessene Zeit*–is not an easy task, the appropriate interpretation of this not fully determined legal term is the task of tribunals. According to Jenny Power the first sentence of Art. 6 of the European Convention for Human Rights signed 4th November 1950 in Rome may prove helpful for the interpretation of the term reasonable time.[38] The first sentence of Art. 6 of the Convention determines the entitlement to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law as a fundamental right.

I would like to indicate that to the interpretation of the term of reasonable time even the international commercial law can provide some help too. The United Nations Convention on Contracts for the International Sale of Goods (CISG)–which in fact does not deal directly with arbitration questions, yet *nolente-volente* it has been applied in numerous arbitration procedures as material law–also know the term of reasonable time.[39] The first paragraph of

[37] See: Power: *The Austrian Arbitration... op. cit.* 30.

[38] See: Power: *op. cit.* 30–31.

[39] In relation to the Vienna CISG see: Mádl, F.–Vékás, L.: *Nemzetközi magánjog és nemzetközi kapcsolatok joga* (International Private Law and Law of International Relationships). Budapest, 1992[3]. 378–397; Sándor, T.–Vékás, L.: *Nemzetközi adásvétel* (International Sale of Goods). Budapest, 2005.

Art. 43 of the CISG stipulates that the emptor looses his right to rely on the warrant provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim. In accordance with Point b) of Par. 2 of Art. 64 of the Convention in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so in respect of any breach other than late performance by the buyer, within a reasonable time. According to Par. 7 of Art. 587 of the current ZPO in case the party does make the necessary nomination after the commencement of, but before the resolution stating the end of the procedure before the court for the appointment of the arbitrator, and it is proven by this party, then this very procedure will be terminated. This section–in my opinion–emphasizes the party's procedural autonomy in arbitration proceedings. (*Nota bene*, this provision is not included in the Model Law.)

Par. 8 of Art. 587 of the ZPO provides basis for the court appointing the arbitrator, by stating that the court of justice–during the course of appointment of the arbitrator–should take into account the provisions set out by the arbitral contact of the parties, moreover the circumstances which are needed for the appointment of independent and impartial arbitrators. It is important to emphasize that the ZPO–contrary to the Model Law–does not provide that in case of a sole arbitrator or a tribunal the possibility should be taken into consideration that the appointed arbitrator should have a different nationality from that of the ones which were nominated by the parties. Par. 9 of Art. 587 of the ZPO provides that there is no appeal against the decision of court in the matter of the appointment of the arbitrator.

III.

The ZPO does contain provisions on the exclusion of arbitrators, yet they do not define the terms independence nor impartiality. The rules on the exclusion basically follow the stipulations of the Model Law, however they are not altogether identical to them. Par. 1 of Art. 588 of the ZPO provides that the person who intends to accept the arbitrator's position shall notify every possible circumstances which would doubt his independence or impartiality of moreover which is in contradiction to any agreement of the parties. The arbitrators are obliged to disclose without delay any such circumstances from the time of

acceptance of the nomination throughout the whole arbitral proceedings, with the exception of a previous notification to the parties of the circumstances.[40]

The Austrian act does deviate significantly from the Model Law on two points. According to Art. 12 of the Model Law, when a person is sought out for a possible arbitrator nomination, he should reveal any such circumstance which could be sources of well-grounded, justified doubts about his independence and impartiality. It is clear that the obligation to notify applies only when the given person is intended to accept the nomination. This is in correlation with the old text of Art. 579 of the ZPO–to which we have referred to earlier–which paragraph stipulates that no one is obliged to accept the arbitrator's position. According to Austrian law, every other circumstance shall be revealed which could awake doubts about the impartiality and independence, while the Model Law provides such obligation only in case of a justified doubt.

The second section of Art. 588 of the ZPO provides that arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or that he does not possesses the qualifications required by the agreement of the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he participated, only for reasons of which he becomes aware after the participation in the appointment or after the appointment has been made. This later provision clearly takes over the text found in the Model Law. According to certain scientific views, not even the circumstance that the party to the case did not have any knowledge of the ground of challenge because of his considerable negligence would prohibit this party to initiate a challenge.[41]

Since Austrian law itself does not define the terms of independence and impartiality, it is the task of the practice to work out their frames. In general it can be noted that the arbitrator's obligation to notify the parties on the

[40] It is advisable to refer other German text: „*§ 588. (1) Will eine Person ein Schiedsrichteramt übernehmen, so hat sie alle Umstände offen zu legen, die Zweifel an ihrer Unparteilichkeit oder Unabhängigkeit wecken können oder der Parteivereinbarung widersprechen. Ein Schiedsrichter hat vom Zeitpunkt seiner Bestellung an und während des Schiedsverfahrens den Parteien unverzüglich solche Umstände offen zu legen, wenn er sie ihnen nicht schon vorher mitgeteilt hat.*" *(When a person intends to assume the office of an arbitrator, he shall disclose any circumstances likely to give rise to doubts as to his impartiality or independence or which are in conflict with the agreement of the parties. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.)*

[41] For this see also: Thomas, H.–Putzo, H.: *Zivilprozessordnung*. 25. ed. Munich, 2003. 1036, 5. section.

partiality and lack of independence is obvious when he has a personal, business or financial interest in connection with the subject of the case, he has substantial previous knowledge in relation with the legal dispute, or has a personal connection to the parties or incidentally to the other arbitrators.[42]

Taking into consideration that the currently normative legal regulation in Austria entered into force 1st July 2006, the consideration of the previous regulation can be important from the aspect of the examination of this question too.

The former Par. 1 of Art. 586 of the ZPO stipulated that against arbitrators one can file motions of challenge on the same grounds as against a state judge. Par. 2 of Art. 586 deviates from the regulation currently in force because it states that the party who participated in the nomination of the arbitrator, may present a motion of challenge against this arbitrator only for reasons of which he becomes aware after the participation in the appointment or after the appointment has been made. As quoted above, the current rules that are based on the Model Law do not include such expressions, however we have to implicitly imply it, since a ground for challenge arises after the appointment, evidently the nominating party may only learn this fact after the appointment.

In Austria, the rules on the challenge of state judges are contained in the jurisdiction act of civil procedures, the *Jurisdiktionsnorm* (JN). The full title of the act is *Gesetz vom 1. 8. 1895 über die Ausübung der Gerichtsbarkeit und die Zuständigkeit der ordentlichen Gerichte in bürgerlichen Rechtssachen.* Article 19 of the JN bears the general title of reasons for omission and challenge of judges (*Ablehnungsgründe*). According to this Article a judge may be challenged if *(i)* if the judge is excluded from proceedings in cases defined by law, moreover *(ii)* if there are satisfactory grounds that doubt the impartiality of the judge (*Unbefangenheit*). The first group can be considered as absolute exclusion grounds after the terminology of Hungarian law–by the Austrian legal practice real grounds of exclusion (*Ausschliessungsgrund*)–while the later group could be named as relative grounds of exclusion, which is known to Austrian legal practice as grounds of objections (*Ablehnungsgrund*). (In the followings we will use the terms of Austrian terminology, i.e. exclusion grounds and objection grounds.)

Exclusion rights are contained in Art. 20 of the JN. According to this exhaustive list there is a ground of exclusion against the judge if the judge is party to the case, co-obligor or co-creditor, or obligor of compensation, the spouse or defined relative (step-child, step-parent, adopted child or foster

[42] See: Holtzmann, H. M.–Neuhaus, J. E.: *A Guide to the UNCITRAL Model Law on International Commercial Arbitration.* Deventer, 1989. 389.

parent) of the judge is a party to the case, the judge is or was empowered by either party, the judge participated in the making of decision of a lower level court of justice, in connection of which the appeal was filed.

In case of these exclusion grounds the judge, or arbitrator has to be excluded from the proceedings without any examination of his independence of impartiality. Taking into consideration that during the analysis of the exclusions of arbitrators the practice of challenges of state judges can show us important directions, it is practical to examine it too.[43] According to Austrian practice the prejudice is an obstacle raised by psychological mechanisms to an impartial decision. Single procedural decisions made during the course of proceedings cannot establish a ground for exclusion in general, as far as they allow the appearance of the lack of objectivity. A special relationship to any of the witnesses can also lead to partiality.[44]

Partiality can be determined as well in case one of the parties is a former judge who worked at the same court of justice where the given proceedings are under way. Partiality was established in another case too, where the judge had been a former colleague of one of the parties, and the dispute of the parties was known to him by way of informal meetings. The case can be viewed as particularly interesting where one judge was determined impartial because he shouted at one of the party, after which he left the room without saying goodbye and slamming the door behind him.[45] The case is somehow more understandable where the judge disclosed his opinion on the case to one of the parties without the hearing of the other party, whereafter the judge declared that he would change his opinion only if the circumstances which he heard would have changed in a significant way–he was deemed not to be impartial.[46]

Naturally there are more cases where the partiality of the judge was not established. For example the judge was not partial in the case where one of the party was a member to an association where there judge himself was a member to, since the judge was not an active member and he had no personal interest in the outcome of the legal dispute.[47] In an interesting case the judge's impartiality was determined where his individual opinion in a given legal

[43] This opinion is shared by: Power: *The Austrian Arbitration... op. cit.* 34.

[44] In relation with these cases see: Stohanzl: *op. cit.* 26–27.

[45] See: LGZ (*Landesgericht*) Wien, 27. 07. 1993 (72.768) and LGZ Vienna, 6. 10. 1992. (69.693). The cases quoted by: Liebscher, Ch.: *The Healthy Award. Challenge in International Commercial Arbitration.* The Hague–London–New York, 2003. 275.

[46] See: LGZ Wien, 27. 02. 1991 (66.834). Quoted by: Liebscher: *op. cit.* 275.

[47] See: OGH (*Oberster Gerichtshof*). 7. 11. 1991 (117). Quoted by: Liebscher: *op. cit.* 275.

question was known.[48] This deserves special attention since in case of such a particular opinion on a very special legal question there is a chance that a case that contains that given legal question will be decided by him according to his particular opinion, that is it is possible that the psychological attitude required for an impartial and objective decision is lacking. As mentioned above, Austrian legal practice required a kind of psychological independence for impartiality as well, that is why it is questionable whether the viewpoints expressed in two legal cases are in full accordance with each other.

It should be noted that in one arbitration case the arbitrator was found impartial in spite of his enraged behaviour. The explanation to this is that the reason for the behaviour of the arbitrator was the conduct of the lawsuit of one of the parties, yet because of the nature of this conduct the behaviour of the arbitrator was deemed acceptable and they saw no reason to determine his prejudice.[49] Impartiality was found in an other arbitration case where the arbitrator had represented one of the parties in a former lawsuit.[50]

There is a significant difference between grounds of objections and grounds for exclusions in the older Austrian regulation even from the aspect of procedural law. While grounds of exclusion (*Ausschliessungsgrund*) shall be taken into account by the arbitral tribunal *ex officio*, the objection grounds (*Ablehnungsgrund*) are to be examined only if any of the parties presents such motion.[51]

The other significant difference can be seen clearly in one decision of 2005 of the Austrian Supreme Court of Justice (*Oberster Gerichtshof*). According to the factual background of the case, one of the parties requested the invalidation of the arbitral award of the International Arbitral Centre of the Austrian Federal Economic Chamber brought on 19th February 2004. His contestation included the argument that he learned of a ground of objection only after the delivery of the arbitral award. His petition was denied by the court of first instance, the decision of which was later upheld by the court of appeal. The Supreme Court of Austria has ruled that the petition was receivable, but it was denied on the substance. The Supreme Court expressed the viewpoint that one has to make a difference between grounds of objections (*Ablehnungsgrund*) and grounds of exclusion (*Ausschliessungsgrund*). The petition for invalidation of the arbitral award could only be supported by an exclusion ground which

[48] See: OGH 18. 04. 1989 (110). Quoted by: Liebscher: *op. cit.* 275.

[49] See: LGZ Wien 21. 03. 1989 (41.530). Quoted by: Liebscher: *op. cit.* 275.

[50] See: OGH 15. 12. 1971 (208/71) The undisclosed verdict is quoted by: Liebscher: *op. cit.* 276.

[51] More on this: Fasching: *Zivilprozessrecht. op. cit.* 776.

came lately to the knowledge of the party, yet a thus lately learned ground of objection cannot establish a claim on invalidation.[52]

It should be noted that in the view of *Prof. Walter H. Rechberger* the difference between grounds of exclusion and objection is an exploded theory, therefore he deems it appropriate that new arbitration rules avoid such distinction in the future.[53]

We could find ample examples for the judgement of the impartiality of judges and arbitrators in earlier Austrian case law, which should have some affections on the practice developed on the basis of laws currently in force. With attention to both this and the texts of legal regulations currently in force if one is to investigate the questions of impartiality and independence, one obviously has to take into consideration the special circumstances and facts of the given case.[54]

Article 589 of the ZPO in force, contains the rules of exclusion. According to the first paragraph parties may agree upon the rules of exclusion freely, however they have to be mindful of the possibility of the legal remedy of the third paragraph. In case parties do not stipulate the rules of exclusion, then rules in Par. 2 of Art. 589 shall apply. According to these rules, the party who presents the motion of challenge has to file the petition containing the grounds of exclusion to the arbitration tribunal within 4 weeks of obtaining knowledge of the composition of the tribunal or of the ground of exclusion. Should the challenged arbitrator not withdraw from his office, or the other party does not agree with the exclusion, the arbitral tribunal–with the affected arbitrator–shall decide upon the challenge.

Par. 3 of Art. 589 provides that in case the challenge proves unsuccessful, the challenging party may appeal to the court of justice for a decision on the challenge within 4 weeks upon receipt of the decision. There is no appeal against the decision of court. The procedure before the court is no obstacle to the proceedings and decision-making of the arbitral tribunal–the arbitrator challenged included. With attention to the 1st Par. of Art. 589 there is no deviation from the provisions of the Par. 3, not even in case the parties agree upon special procedures of challenge.

The above written rules of the ZPO actually take over the stipulations of the Model Law with the difference that according to the Model Law the motion for challenge shall be presented within 15 days, and the appeal for the court of

[52] See: OGH 26. 1. 2005 OGH 7Ob314/04h. Can be found at http://fremuth-wolf.com/arbaut/newsletter/ index.php?archiv_id=22.

[53] See: Rechberger: *Einführung in das neue... op. cit.* 10.

[54] See: Power: *The Austrian Arbitration... op. cit.* 34.

justice shall be filed within 30 days upon receipt of the declining decision on the challenge.

Previous to the acceptance of the current provisions of the ZPO two professors of the Vienna University, *Prof. Peter Böhm* and *Prof. Ena-Martis Bajons* has presented a commentary to the draft statue in their letter of 22nd June 2005 addressed to the Justice Ministry. According to the letter, the rule of Par. 2 of Art. 589 of the ZPO–which allowed the challenged arbitrator to participate in the decision on the challenge–is in contradiction to an important principle of Rechtstaat, that is no one is to decide in one's own case. The authors of the letter intended to take the edge of this critical remark inasmuch that the legal remedy in Par. 3 of Art. 589, the revision by court of justice represents a possibility to correct the decision brought in this peculiar situation.[55]

Although parties are granted with a relatively great freedom in regulating the rules of exclusion, it deserves noting that numerous arbitral institutes, like the Arbitral Centre of the Austrian Federal Economic Chamber presents detailed regulations on relation to which body of the arbitral institution will be entitles to decide in challenge procedures. (We will discuss these rules in details later on.)

We have to note, that Par. 3 of Art. 601 of the new Austrian Arbitration Act follows Par. 3 of Art. 1049 of the German Code of Civil Procedures. The Austrian law provides here that experts appointed by the arbitral tribunal are subject of the stipulations of Art. 588 and Par. 1 and 2 of Art. 589 of the act. This means that the legal institution of exclusion and the challenge procedure apply for experts as well, but with the important difference that Par. 3 of Art. 589–which establishes the legal remedy by court of justice against an unsuccessful motion of challenge–does not apply in the procedure of challenge against experts.[56] This entire means that the lack of impartiality and independence of experts do not establish a basis for the invalidation of the arbitral award. It is relevant too that this procedure of challenge applies only on experts appointed by the tribunal. Thus private experts of the parties cannot be challenged. The probative value of reports of such experts are to be evaluated appropriately by the proceeding tribunal itself.[57]

Although it is not implied in the text of Par. 2 of 589 expressively that in case no challenge was made before the tribunal, the appeal to a court of justice is excluded in this aspect, international scientific literature argues that the

[55] For a full text see http://www.parlinkom.gv.at/pls/portal/docs/page/pg/DE/XII/ME/ME_00280_21/ FNAMEORIG_04.

[56] Zeiler–Steindl: *The New Austrian Arbitration... op. cit.* 64–65.

[57] For this see: Power: *The Austrian Arbitration... op. cit.* 75–76.

possible enforcement of claims before a court of justice has to be preceded a motion of challenge before the arbitral tribunal, since the reason for this is to avoid the lengthening of arbitration procedures.[58]

The legal remedy of court of law in connection with the challenge has its goal in the revision of the decision of the arbitral tribunal. It has an increased importance that this petition is to be filed to the court of law within 4 weeks. Because if no appeal was to the court of law within 4 weeks of the receipt of the decision dismissing the challenge, or the court of law denies the petition, then there is no place for a petition which is based upon Par. 2 of Art. 611 of the ZPO and which is aimed at the invalidation of the arbitral award.[59]

It is clear from the above written that the deadline of the filing the remedial appeal in subject of the challenge may be passed only with forfeiture of right. It deserves noting that previous to the framing of the current arbitration regulation there were concepts–not supported in the course of legislation later on–which deemed in inadvisable to tie this deadline to loss of rights. This was reasoned by them–as showed by *Christian Koller* as well–that the lack of independence and impartiality could mean even the infringement of public order (*ordre public*), and thus it is iniquitous that in case the missing of the deadline of the appeal to the court of law one cannot contest the arbitral award on this basis.[60]

It is important to emphasize that Par. 3 of Art. 589 of the ZPO includes a rule which cannot be renounced, that is, the civil remedy cannot be excluded in this question. This is in full conformity with Par. 579 of the ZPO, according to which parties may renounce the right of objection only against measures of the arbitral tribunal, if the rules of arbitration of the ZPO allow deviation in relation to this measure, that is there is no right of renouncement in connection with the cogent rules.[61] The obvious purpose of this rules is the assurance of the neutrality of the arbitration proceedings.

[58] See: Holtzmann–Neuhaus: *A Guide to the UNCITRAL... op. cit.* 37.

[59] On the basis of Par. 2 of Art. 611 of the ZPO one can request the invalidation of the arbitral award if the setting up of or the composition of the arbitral tribunal was contrary to the approvable agreement of the parties or in contradiction with the provisions of Art. 611.

[60] See: Koller, Ch.: *Das neue österreichische Schiedsrecht – Die wichtigsten Neuerungen des Schiedsräg. 2006 im Überblick. Teil I.* Juristische Ausbildung und Praxisvorbereitung. 2005/2006/03. 186[21] p.)

[61] Art. 579 of the ZPO stipulates as follows: *„Hat das Schiedsgericht einer Verfahrensbestimmung dieses Abschnitts, von der die Parteien abweichen können, oder einem vereinbarten Verfahrenserfordernis des Schiedsverfahrens nicht entsprochen, so kann eine Partei den Mangel später nicht mehr geltend machen, wenn sie ihn nicht unverzüglich ab Kenntnis oder innerhalb der dafür vorgesehenen Frist gerügt hat.“ (Where*

The prevention of the tactic to prolong the arbitration proceedings appears basically in two places in the part of Austrian arbitration law discussed here. The rule also supported by the practice of law according to which in the event the party does not present the challenge to the arbitral tribunal, but uses it only in the civil procedure on the invalidation of the arbitral award, then the challenge cannot be accepted, is obviously preventing the vindication of the tactic that a reason for exclusion is in fact used as a "time bomb" by the party and he may use it after the declaration of the arbitral award. Beside that this tactic has its purpose in the prolongation of the proceedings, it is in itself in contradiction with the legal institution of exclusion. In my opinion the legal institution of exclusion should be in relation with the independent and impartial arbitrators proceeding in arbitration procedures, and not with the exploitation of the motion of challenge by a party in a time deemed as favourable for him, when an unfavourable award has been made. Jean-Pierre Ancel–in whose opinion state courts of justice have key roles in impeding tactics aimed at the prolongation of the proceedings–refers to French legal case examples where the lack of independence of arbitrators only appeared in the arbitral award. In this case the motion for exclusion (furthermore for the determination of lack of independence) should be presented to the court which is entitled to decide on the legal redress against the arbitral award.[62]

A further obstacle to tactics aimed at the prolongation of arbitration procedures can be found in Par. 3 of Art. 589 of the current ZPO, according to which the arbitral tribunal may decide the case in the merits even if there is a revision procedure in its course on the decision dismissing the challenge of one of the arbitrators. It is another question of course that the arbitral tribunal may decide to wait with for the decision of the civil court of law, which is especially meaningful if the court of law excludes the arbitrator, since this decision would serve as a ground for the invalidation of the arbitral award.[63]

According to the older–already invalidated–Austrian arbitration rules an arbitral body of the arbitral institution was entitled to decide on the challenge.

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the arbitral tribunal has not complied with a procedural provision of this part from which the parties may derogate, or with an agreed procedural requirement of the arbitral proceedings, a party shal be deemed to have waived his right to object if he does not object without undue delay after having become aware of the failure, or within the provided time limit.)

[62] Jean-Pierre Ancel refers to the verdict reached in March 1998 in the *Excelsior Film* case by the 1st Civil Department of the French *Cour de Cassation.* See: Ancel, J. P.: Measures Against Dilatory Tactics: The Cooperation Between Arbitrators and the Courts. In: ICCA Congress series no. 9 (Paris/1999). 420.

[63] See also: Power: *The Austrian Arbitration... op. cit.* 38.

However there were no civil redresses before state courts against the decision on the challenge during the course of the arbitration proceedings. (This rather strict regulation differs from other Western European state's–like that of Germany–relevant provisions.) In the case however the challenge was dismissed without any grounds, the invalidation of the arbitral award could be requested on the basis of Point 4 of Par. 1 of Art. 595 of the old ZPO.[64] Although the Supreme Court of Austria took the viewpoint that the grounds listed in Art. 595 of the ZPO, on which the invalidation of the award may be requested, is an exhaustive list, there are such opinions in scientific literature that in case of other severe breaches of procedural rules not listed in Art. 595. of the ZPO the invalidation of the award may be requested by virtue of infringement of public order.[65] Point 6 of Par. 1 of Art. 595 of the older ZPO included the public order clause, truly not by this definition, yet with the same interpretation.[66] The prevailing Point 5 of Par. 2 of Art. 611 which deals with the invalidation of the arbitral award expressively contains that the invalidation of the arbitral award may be requested by virtue of its contradiction with the foundations of Austrian legal order, with public order (*ordre public*) in case the arbitral proceedings were conducted in such a way.[67]

Concerning the invalidation of the arbitral award in the prevailing Austrian law from the aspect of our theme, we have to underline the followings. Par. 1 of Art. 611 of the ZPO provides that by action of civil law only the invalidation of the arbitral award may be requested. The petition may be filed within 3 months upon receipt of the award. In respect of Point 4 of Par. 2 of Art. 611 of

[64] Point 4 of Par. 1 of Art. 595 of the old ZPO contained the following provision: „*§. 595. (1) Der Schiedsspruch ist aufzuheben ... 4. wenn die Ablehnung eines Schiedsrichters vom Schiedsgericht ungerechtfertigt zurückgewiesen worden ist.*"

[65] See: OGH, 18. 11. 1982 (1983). Quoted and commented by: Liebscher: *The Healthy Award. op. cit.* 295.

[66] Point 6 of Par. 1 of Art. 595 of the older ZPO basically stipulates on infringement of the principles of Austrian legal order, furthermore that of mandatory applicable legal regulations in relation with the invalidation of arbitrator awards: „*§. 595. (1) Der Schiedsspruch ist aufzuheben ... 6. wenn der Schiedsspruch mit den Grundwertungen der österreichischen Rechtsordnung unvereinbar ist oder gegen zwingende Rechtsvorschriften verstösst, deren Anwendung auch bei einem Sachverhalt mit Auslandsberührung nach § 35 IPR Gesetz durch eine Rechtswahl der Parteien nicht abbendungen werden kann.*"

[67] Point 5, Par. 2 of Art. 611 of the current ZPO contains the term of infringement of public order as follows: „*611. § (2) Ein Schiedsspruch ist aufzuheben, wenn ... 5. das Schiedsverfahren in einer Weise durchgeführt wurde, die Grundwertungen der österreichischen Rechtsordnung (ordre public) widerspricht.*" *[An award shall be set aside if ... 5. the arbitral proceedings were conducted in a manner that conflicts with the basic principles of the Austrian legal system (ordre public).]*

the ZPO the invalidation of the award may be requested in case the party had not received appropriate notice on the nomination of arbitrators or on the arbitral proceedings, or by other grounds he had been unable to present his case. As noted before, according to Point 4 of Par. 2 of Art. 611 of the ZPO one can contest the arbitral award in case the setting up (*Bildung*) or composition (*Zusammennsetzung*) of the tribunal was not in accordance with the law or the acceptable agreements of the parties.[68] As referred above, in case the challenging party did not appealed to a civil court of justice against the dismissing decision of the arbitral body, or if it was denied by the court of justice, then on this ground on the basis of Point 4 of Par. 2 of Art. 611 of the ZPO he cannot request the invalidation of the arbitral award.

It is important to note that this regulation of the ZPO differs somewhat from the provisions of the Model Law. That is to say Sub-point (iv) of Point a) of Par. 2 of Art. 34 of the Model Law does not only allow invalidation if the establishment or composition of the tribunal did not comply with legal regulations or appropriate stipulations of the parties, but in the case the arbitral proceedings itself were on contradiction with these rules as well. The Austrian ZPO contained this possibility–that is the request of invalidation on grounds of *contra legem* proceedings–in another place, namely Point 5 Par. 2 of Art. 611 of the ZPO, which was quoted above.

In case Point 4 of Par. 2 of Art. 611 of the ZPO applies–taking into consideration the abovementioned–it is enough to prove that the establishment or composition of the tribunal did not comply with the rules, thus it is unnecessary that all this would have any affection on the decision on merits.[69] Thus here Austrian law provides significant legal protection for guarantees in relation with the composition of the arbitral tribunal, contrary for example to German law. Namely, Sub-point d. of Point 1 of Par. 2 of Art. 1059 of the German Code of Civil Procedures (*Deutsche Zivilprozessordnung*) provides that for the request on invalidation of arbitral awards, a presumed affection on the final award of the irregular arbitral proceedings or of irregular composition of the arbitral tribunal is also needed.[70]

[68] See: *„611. § (2) Ein Schiedsspruch ist aufzuheben, wenn ... 4. die Bildung oder Zusammensetzung des Schiedsgerichts einer Bestimmung dieses Abschnitts oder einer zulässigen Vereinbarung der Parteien widerspricht.“ (An award shall be set aside if:...4 the constitution or composition of the arbitral tribunal was not in accordance with a provision of this part or an admissible agreement of the parties.)*

[69] Cf.: Power: *The Austrian Arbitration... op. cit.* 115.

[70] Sub-point d. of Point 1 of Par. 2 of Art. 1059 of the German Code of Civil Procedures provides: *„§. 1059. (2) Eins Schiedsspruch kann nur aufgehoben werden, wenn der Antragsteller begründet geltend macht, dass ... d) die Bildung des Schiedsgerichts oder*

The new Austrian arbitration law for the most part regulates the early termination of the mandate of arbitrators in the basis of the Model Law in Art. 590 of the ZPO. The mandate of an arbitrator terminates when the arbitrator withdraws from office, moreover the parties mutually agree on his termination. In accordance with Par. 2 of Art. 590 any of the parties may appeal to a court of law to request the termination of the mandate of the arbitrator in case the arbitrator becomes incapacitated to proceed with his task or he is in unjustified delay with the fulfilment of his obligations and the arbitrator does not withdraw from office, the parties cannot agree upon the termination of the mandate of the arbitrator, or the arrangements stipulated by the parties for this case does not prove successful. It is important that in case the arbitrator withdraws from office according to Par. 1 of Art. 590 or after the filing of a motion of challenge against him, does not mean the acceptance of any of the exclusion grounds or grounds listed in Par. 2 of Art. 590 This in fact provides an opportunity for the arbitrator to leave office without any possible further impeachments or even any loss of prestige.[71]

Art. 591 of the ZPO contains stipulations on the election of deputy arbitrators which are identical to the rules of the nomination and appointment of arbitrators. A deputy arbitrator is obviously elected in the case when the mandate of the previous arbitrator is terminated. Par. 2 of Art 591 of the ZPO includes a rule on reasonable and economical conduct of the proceedings, inasmuch in case unless otherwise agreed by the parties, arbitrators shall continue with the proceedings taking into account the insofar finished previous procedural stages and results, including the minutes of the hearings. Naturally at the consideration of previous minutes–which were created in the presence of the arbitrator who left the tribunal–it is advisable to regard the grounds on which the arbitrator left office, this could affect the later evaluation of these minutes as well. It should be noted that this above explained rule of Par. 2 of Art. 591 of the ZPO cannot be found in the Model Law. (This provision is missing from the Hungarian Act on Arbitration, the Act LXXI of 1994, too.)

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das schiedsrichterliche Verfahren einer Bestimmung dieses Buches oder einer zulässigen Vereinbarung der Parteien nicht entsprochen hat, und anzunehmen ist, dass sich dies auf den Schiedsspruch ausgewirkt hat...". The official translation of the German text: "*1059. (2) An arbitral award may be set aside only if the applicant shows sufficient cause that ... d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with a provision of this Book or with an admissible agreement of the parties and this presumably affected the award.*" See: Berger, K. P.: The New German Arbitration Law in International Perspective. *Forum Internationale*, 26 (2000) 36.

[71] For this see: Power: *The Austrian Arbitration... op. cit.* 41.

Summarizing the above written it can be emphasized that the new Austrian arbitration legal regulation differs from the earlier regulation on numerous points. In the matter of the nomination and exclusion of arbitrators the current Austrian rules contain more provisions which were not included in the older regulation and which we intended to sum up above.

Austrian legislators have taken into account to a great extent the Model Law in the framing of this legal regulation, yet there are numerous important questions even from the point of our theme where a different set of rules apply. The new Austrian arbitration rules obviously purpose to make proceedings smoother and more effective. The interpretation of the law by the legal practice will be obviously determined by the case law developed on the basis of these provisions. At the same time it is essential to refer to that the practice of law in its judgement of independence and impartiality will definitely take into account the case law born under the earlier regulation too, being an other reason why we deemed the comparison of the earlier legal rules and judicature with the current provisions law important.

IV.

As stated before, one of the most important arbitration institution in Austria is the International Arbitral Centre of the Austrian Federal Economic Chamber. For this end, it is justified to give a short analysis of the rule pertaining to the arbitration.

The Rules of Arbitration currently in force were accepted by the expanded presidency of the Austrian Federal Economic Chamber on 3rd March 2006, and entered into force 1st July 2006 at the same time as the ZPO novel, replacing the older rules of proceedings accepted by the general assembly of the Austrian Federal Economic Chamber on 30th November 2000 and entered into force 1st January 2001.[72]

The so-called new Vienna Rules were framed in accordance with the above reviewed reform of arbitration law. Art. 7 deals with the appointment of arbitrators. According to Point 1 of Art. 7 the parties are free to agree in appointing the arbitrators. Any person having legal capacity–irrespective of nationality–may be an arbitrator, provided the parties have not agreed upon any special additional qualification requirements. This later provision was missing from the Vienna Rules in force till 30th June 2006, Point 1 of Art. 5 thereof did not contain any information on the qualification of arbitrators. At

[72] Both rules of proceedings can be found at www.wko.at/arbitration.

the same time the previous rules which were in force till 1st January 2000 provided that arbitrators shall possess legal, commercial and other, relevant scientific qualifications and experience.[73] The current procedural rules trust fully on the discretion parties whether arbitrators shall possess special knowledge or experience, the rules of proceedings only grants the possibility that parties may agree upon this question as well.

The currently in force Vienna Rules provide in relation with the nomination of arbitrators that they are to make a written statement as to their impartiality and independence, moreover that they submit themselves to the Vienna Rules of Arbitration. This requirement–also known to other international rules of arbitration–was missing form the former set of rules, it only contained the principle of the requirements of independence and impartiality.[74]

The current Vienna Rules–contrary to the earlier rules–prescribe in Point 5 of Art. 7 a disclosure requirement on the independence and impartiality of arbitrators. This rule is based on Par. 1 of Art. 588 of the ZPO and Par. 1 of Art. 12 of the Model-act with the following differences.

Contrary to the provisions of the ZPO, Point 5 of Art. 7 of the Vienna Rules follows the Model-act in respect that the disclosure obligation of the arbitrator is sets in when he is approached in connection with his possible appointment, and not when he is about to accept the office. On the other hand Vienna Rules follow the ZPO inasmuch the arbitrator shall disclose any circumstances likely to give rise to doubts as to his impartiality or independence, while the Model Law–as we noted above–prescribes this obligation in case of a well-founded doubt. According to the Vienna Rules the arbitrator shall disclose any circumstances hat are in conflict with the agreement of the parties.

Point 3 of Art. 7 of the current Vienna Rules–similar to previous regulations–includes that very important rule which a member of the Presidency Board of the Arbitral Centre may act only as Chairman of an arbitral tribunal or sole arbitrator.[75]

In relation to the nomination of arbitrators it should be underlined that pursuant to the Vienna Rules, either a sole arbitrator or an arbitral tribunal consisting of three arbitrators shall proceed. When no such agreement has been made and the parties do not agree on the number of arbitrators, the Board shall

[73] See: Oppenheim, K.: Választottbíróság Ausztriában. (Arbitration Court in Austria.) *Magyar Jog*, 40 (1993) 733.

[74] The Rules of Proceedings of ICC (*International Chamber of Commerce*) prescribe a similar statement requirement in Par. 2 Art. 7, furthermore Article 5.3 of the Rules of Proceedings of the London LCIA (*London Court of International Arbitration*).

[75] In relation to this see: Baier–Trofaier: *Austria. op. cit.* 23.

determine whether the dispute is to be decided by a sole arbitrator or by an arbitral tribunal on the basis of Point 2 of Art. 14 of the Vienna Rules. In that context, the Board shall take into consideration in particular the difficulty of the case, the magnitude of the amount in dispute and the interest of the parties in a rapid and cost-effective decision. In the event that proceedings before a sole arbitrator are decided upon, the parties shall be requested to agree on a sole arbitrator within thirty days after service of the request. In the lack of such agreement the arbitrator shall be appointed by the Board.

Point 4 of Art. 14 of the Vienna Rules prescribes that if the dispute is to be decided by an arbitral tribunal, and the party that has not yet nominated an arbitrator within thirty days, then the arbitrator shall be appointed by the Board. This point has been changed significantly since previous rules. Point 4 of Art. 9 of the earlier Rules of Proceedings applied a distinction between the claimant and defendant in this question containing a serious consequence. If the Claimant has not appointed an arbitrator within 30 days after service of notice and does not expressly leave the appointment to the Board, the case must be deleted from the list of pending cases, and only if the Defendant fails to appoint an arbitrator within that time-limit, shall the arbitrator be automatically appointed by the Board. Thus earlier rules demonstrated more vigorously in this respect that fundamentally it is in the sphere of interest of the claimant that the arbitration proceedings are conducted.

The challenge of arbitrators is stipulated in Art. 16 of the Vienna Rules. Paragraph 1 of Article 16 follows Par. 2 of Art. 588 of the ZPO and Par. 2 of Art. 12 of the Model-act with the difference that while these later set of rules the lack of qualification agreed by the parties establishes a ground of exclusion, pursuant to the Vienna Rules–along with the doubt arisen in relation with the question of independence or impartiality–circumstances that are in conflict with the agreement of the parties produce a ground of exclusion. Vienna Rules stipulate similar to the ZPO and the Model-act that under what conditions is a party entitled to challenge an arbitrator in whose appointment this party participated.

In this relation the current Vienna Rules contain a more precise provision than earlier ones. Point 1 of Art. 11 of the earlier Rules of Proceedings included laconically that an arbitrator may be challenged if there are sufficient grounds for doubting his independence or impartiality.[76]

[76] It should be noted that according to previous rules–pursuant to Point 3 of Art. 11 of the Rules of Proceedings–a challenge is inadmissible if the party making the challenge has taken part in the proceedings notwithstanding the knowledge which it already had or ought

Points 2, 3 and 4 of Article 16 apply on the rules of challenge. If a party challenges an arbitrator, it must without delay inform the Secretary General thereof, stating the grounds for the challenge. Should the challenged arbitrator not withdraw from his office, the Board shall decide upon the challenge on the basis of the particulars in the challenging motion and the evidence attached thereto. Before the Board makes its decision, the Secretary General must obtain the comments of the arbitrator challenged and of the other parties. The Board can also request comments from other persons.

In spite of the motion of challenge the arbitral proceedings may continue. It is important however that an award may not be rendered until after the final and binding decision of the Board. Nevertheless, we should be aware here of Point 3 of Art. 589 of the act on arbitration, on the basis thereof an unsuccessful procedure of challenge can be appealed.[77]

The current Vienna Rules contain in relation to the exclusion new stipulations which were missing from earlier set of rules. Article 21 of the prevailing Vienna Rules allows that rules applicable to the challenging of arbitrators shall apply accordingly to the challenging of experts appointed by the sole arbitrator or by the arbitral tribunal. The challenge of experts shall be decided on by the sole arbitrator or by the arbitral tribunal.

These provisions of the Vienna Rules cannot be described as exclusive in the field of international commercial arbitration. It deserves special notice that we can find similar decisions in Swiss case law. In one case the Supreme Court of Switzerland has extended the requirements of impartiality and independence onto experts appointed by the arbitral tribunal.[78]

In the light of the above written it is unmistakably clear that the new Vienna Rules intend to comply to a great extent with the rules of Austrian arbitration law in force since 1st July 2006. At the same time it is important that the rules of arbitration of the chamber preserved numerous particular features in subject matter of nomination and challenging of arbitrators. The new Vienna Rules and the practice of law relying on them will presumably contribute significantly to that the several entities of international economy in the future will choose Vienna as the and the International Arbitral Centre of the Austrian Federal Economic Chamber place of arbitration and place of the settlement of their legal disputes as well.

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to have had of the grounds of challenge relied upon, or if the party making the challenge notified the grounds of challenge with undue delay.

[77] For this see: Zeiler–Steindl: *The New Austrian Arbitration... op. cit.* 47.

[78] See: BG (*Bundesgerichtshof*) 28. 04. 2000. The resolution is quoted by: Liebscher: *The Healthy Award. op. cit.* 274.

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CSABA VARGA*

Differing Mentalities of Civil Law and Common Law? The Issue of Logic in Law

1. Mentality and Legal Culture

In recent-day comparative literature, the term of *mentalités juridiques* is being used as the key through which the underlying basic difference between Civil Law and Common Law can be best shown.[1] This term is to englobe the entire view within which law is conceived at all, is named and also put in whatever intellectual context. So it affords one of those paths or aspects for an approach that may be instrumental for a comparative investigation of legal cultures in general and the dilemma of their future convergence or divergence in particular.[2]

2. Naming of Basic Units in a Normative Stuff

From the wide range of linguistic expressions and other objectifications used in the direction of behaviour,[3] the dilemma of rule and/or norm is not a scholarly issue in any direct sense. Neither the dilemma nor its resolution can

* Scientific Adviser, Institute for Legal Studies of the Hungarian Academy of Sciences, H–1250 Budapest, P.O. Box 25; Professor at the Pázmány Péter Catholic University of Hungary, Director of its Institute for Legal Philosophy, H–1428 Budapest 8, P.O. Box 6. E-mail: varga@jog.mta.hu

[1] An expression by Pierre Legrand.

[2] Cf. Varga, Cs.: Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline. *Acta Juridica Hungarica* 48 (2007) 2, 95–113 and Legal Traditions? In Search for Families and Cultures of Law. *Acta Juridica Hungarica* 46 (2005) 3–4, 177–197.

[3] To quote just one author from the rich international literature covering the topic, Opałek, K.: *Theorie der Direktiven und der Normen.* Wien–New York, 1986, 88 lists norms, rules and principles, alongside with persuasion, wish, proposal, request, supplication, advice, warning, as well as recommendation and encouragement, as directions of behaviour. In such a broad sense, see, from the Hungarian literature, Szotáczky, M.: A normák eredete és funkciója (Genese und Funktion der Normen). In: Ádám, A. (ed.): *Tanulmányok Szamel Lajos tiszteletére.* Pécs, 1989. 227–238.

in fact be derived either from the historical etymology of the relevant words or from investigations into the history of basic legal ideas, inspiring or merely reflecting one or another language use. Clear-cut distinctions of meanings regarding these two terms are not even specified either by various historical periods or by the historical cultures of law and legal thought developed in a diversity so far. Although their regular usages may be different compared to each other, in most attempts at a theoretical definition they are still decisively referred to as synonyms,[4] as concepts able to substitute each other nearly completely.[5] Therefore the issue whether one or another usage is preferred by a given language and underlying culture depends for the most part on mere habits of parlance. However, such habits may then (through the latently creative and socially constructive force of the consolidated and consolidating usage of language) get organised into certain (historically self-solidifying) blocks. And from then on, these blocks may in their own manners generate additional meanings, with specifications according to contexts, which may on their part also eventually lead to kinds of separation providing some basis for added theoretisation.

3. Terms of 'Rule' & 'Norm'

The term 'rule' ['*règle*', '*Regel*', '*regola*', '*regla*'] originates from the Latin '*regula*', while 'norm' stems from the Latin '*norma*' as used to denote a tool applied by masons and carpenters in ancient Rome to draw the "carpenter's square".[6] Or, "A *regula*, or rule, is used to draw straight lines.", and "A *norma* is used to make right angles." That is, "The carpenter's norms and rules (meaning

[4] For instance, "The rule is a synonym for 'norm' or 'directive' taken as the declaration of a prescriptive function."–writes W[róblewski], J.: Règle. In: Arnaud, A.-J. (dir.): *Dictionnaire encyclopédique de Théorie et de Sociologie juridique*. Paris, 1988, 346. An even simpler solution is proposed by the basically American *The Philosophy of Law* An Encyclopedia. New York–London, 1999, with the entry 'Rule' referred to–but speaking about nothing but–'Norms' eventually.

[5] This is illustrated by the way how in case even of an otherwise minutely precise author–e.g., Pavčnik, M.: Pravno pravilo. *Zbornik znanstvenih razprav* [Ljubljana] (1995), 217–240 and in his Die Rechtsnorm. *Archiv für Rechts- und Sozialphilosophie* 83 (1997) 4, 463–482–, one term is simply replaced by the other when changing between Slovenian and German languages. For a Hungarian and German inter-change, see also Peschka in note 30.

[6] *Online Etymology Dictionary* <http://dictionary.reference.com/browse/norm>.

the tools) make right–norms make orthogonal and rules makes straight–that which they shape."[7]

In its present sense, 'norm'–mostly in derivatives such as 'normal, 'normality', etc.–is a product of 19th-century development, differentiating and homogenising human conditions as well as social processes and attitudes of production, for adjusting them to previously set standards. To denote nothing but 'standard', the term 'norm' was first used in pedagogy, and then, in health care, and only later on, in the course of the same century, it got also extended to standardisation in production and technology, for that phases and successive steps of the same industrial processes can be isolated, defined, combined and re-organised as a series of distinct patterns.[8]

Let us mention as an illustrative example of incidentalities in the history of the usage of words that, in its original meaning, 'rule' once served–instead of the causal succession meant by the expression of "if [...], then [...]", implying conditional repetition firstly describing, and then, partly prescribing those facts which may in their conceptual generality constitute a case, and partly also ascribing a sanction to them–to express some basic backgrounding wisdom or synthesising *adage*, summarising the versatility of Roman jurisprudents indefatigably searching for the principles of a justifiably right–and preferredly exclusively right–solution.[9]

According to its philosophical definition, the rule is a "formula indicating or prescribing what is to be done in a certain situation", noting in this very context that its prescriptive use affords a criterion with selective force and that no such use shall be overshadowed by those recently spread constative uses which are–mostly as connected with the senses of 'regular/irregular', or 'regularity', and so on–worded as if they were merely descriptive.[10]

On the other hand, norm is the "concrete type or abstract formula of what has to be done, at the same time including a value judgement in the form of some kind of ideal or rule, aim or model", adding to the definition above that

[7] Pattaro, E.: *The Law and the Right* A Reappraisal of the Reality that Ought to be. Dordrecht, 2007, 62.

[8] See, e.g., Foucault, G.: *Surveiller et punir.* Paris, 1975, 186 and Canguilhem, G.: *Le normal et le pathologique* 4e éd. Paris, 1979. 175.

[9] For more details, see Varga, Cs.: *A jogi gondolkodás paradigmái.* 2nd ed., Budapest, 2004. 33–34, enlarging explanations he afforded in his *Lectures on the Paradigms of Legal Thinking.* Budapest, 1999.

[10] Lalande, A.: *Vocabulaire technique et critique de la philosophie* [1926], Paris, 1991, 906–907. According to Ota Weinberger's similar (and somewhat simplifying) formulation–in his The Role of Rules. *Ratio Juris* 1 (1988) 3, 224–240, especially para. 1, 225.–, "Rules are advice to be used in determining action."

norms are mostly formulated in order to express some logical thought or act of will, or free representation, or emotion or ideal of beauty.[11]

When, accordingly, norm is taken as "synonym of 'rule' " (with the latter regarded as somewhat "more general"[12] or "more wide and generic"[13]), it is remarkable that in everyday usage the rule is still primarily an explicit or posited formulation–as the in-itself neutral and historically accidental outcome–of some 'rule-enactment' or 'regulation', while the norm is either the logical (i.e., logified) form of the above or the logical (and normative) prerequisite of the act of regulation itself.

This explains why 'rules' may either be ones of experience[14] or, specifiedly, ones of a game, e.g., of the law (expressed as *Spielregeln & Rechtsregeln*). All this is unproblematic so far as we are only interested in them as the manifestation of (or access to) something else, taken as more basic. As to its apparent pair, 'norms' enter the scene when the rule's intended or probable notation becomes problematic and requires further investigation in a way that out of the rule as the presentation of something made accessible to us, we start searching for gaining an identifiable message by means of the former's logical (etc.) analysis.

It is surely not for mere chance that we can hardly speak of, for instance, 'creation of norms'; and we only speak of 'provision of norms' when we intend to emphasise either the field as being "normed" (ordained under regulation) or the artificiality of the said regulation. Notwithstanding, present-day literature suggests the idea as if the norm separated out of the rule by its mere linguistic formulation as a logical proposition. Actually, however, it is not the rule but the norm alone that is considered and also treated in an onto-epistemological (and, alongside with it, also psychological and logical, etc.) perspective, in order to be able to interpret it both as an enunciation[15] and as the contents of denotation (inherent, among others, also in a psychologically examinable act of will).[16]

That what has been explicated above seems to be substantiated by the fact that while in English language, for instance, historical dictionaries specify

[11] T[roper], M. & L[ochak], D.: Norme. In: *Dictionnaire encyclopédique*...[note 4], 691.

[12] E.g., Perrin, J.-F.: Règle. In: *Archives de Philosophie du Droit* 35: Vocabulaire fondamental du droit. Paris, 1990, 245–255.

[13] Borsellino, P.: Norms. In: *The Philosophy of Law* An Encyclopedia [note 4], 596–598, especially on 596.

[14] *Ibid.*

[15] See, above all, Alchourrón, C. E.–Bulygin, E.: *Normative Systems.* Wien–New York, 1971.

[16] See, primarily, Kelsen, H.: *Allgemeine Theorie der Normen.* Wien, 1979.

more than twenty entries of meaning and fields of application for the usage of the single word 'rule', each of these are still related exclusively to the availability or prevalence of a given measure of behaviour, either indicating or just carrying and/or enforcing it, without any of them claiming even incidentally that the rule itself will serve as the *denotatum* (with the objectivation itself or its communication embodying for us this very measure either through its textuality and grammatical make-up or owing to–as reconstruable from–the logical interrelationship among its elements).[17] Moreover, the pervasive strength of the English language mentality is excellently shown by the fact that not even the amazingly late and rather slow spread of the word 'norm' provoked any change. Namely in English, quite until linguistic (later on: linguistico-logical) analysis grew into the main trend of moral philosophising in the first decade of the 20th century, the word 'norm' had exclusively been used to refer to some standard, pattern or measure made available, and by far not in order to imply that the standard, pattern or measure itself could have been embodied (objectified[18]) by it in a way that one and exclusively one single right meaning could be extricable from such an embodiment.[19]

In language use, we do not to talk about 'logic of rules' instead of 'logic of norms'. No way in everyday practice we do equate the two terms with each other. Only a 'logic of norms' can be thought of, as if accepting in advance

[17] *The Compact Edition of the Oxford English Dictionary* Complete Text Reproduced Micrographically, I–II. Oxford, 1971, 2599–2600. In incidences far away in the past, such examples may affirm this: "Þeos riwle" [*Ancren Riwle a* (1225) {2 (Camden Soc. 1853)}] or "Þe pope [...] forsook Þe rule of Þe olde tyme" [John de Bartholomeus (de Glanvilla) Trevisa: *Polychronicon Randulphi Higden* (tr. 1387), VII, 431 {Rolls series 1865–1867}] (original edition of the *Oxford English Dictionary*, 881, column 3 and 882, column 1, respectively). Against the historically established use, it is exclusively the modern (and, in a linguistic sense, rarer) professional usage that can attribute the word such a meaning: "Either according to the rules of the common law, or by the operation of the Statute of Uses." *Penny Cyclopædia of the Society for the Diffusion of Useful Knowledge* (1842), XIX, 379/2, quoted by *Oxford English Dictionary*, 882, column 2.

[18] Obviously, this is a case of secondary objectification, i.e., one objectified by (through/in) previous objectification (copying the pattern of "secondary nature", built by humans for their servicing, upon the genuine nature as found and made use of on Earth). Cf., in a legal context, Varga, Cs.: 'Thing' and Reification in Law. In: Varga, Cs.: *The Place of Law in Lukács' World Concept.* Budapest, 1985, ^{2}1998.

[19] It is to be noted that from 1676 on, the word appeared in the form of *'norma/normae'*, always italicised as a borrowance from the Latin, and started to spread as *'norm'* only from 1885, albeit between 1821 and 1877 mostly in pairs of synonyms such as, e.g., *'norm or model'*, *'norm and measure'* or *'norm or principle'*. *Ibid.*, 1942, respectively (as in the note *supra*) 207, column 3.

that nothing but linguistic propositions conceived of (or prepared as to serve) as logical units can be subjected to either logical operation or any genuine linguistico-logical analysis.

4. Variety of Denotations

All this may lead us to the conclusion that in actual occurrences and according to a nominal definition, 'rule' and 'norm' denote the same, the former considered from the point of view of making it accessible (communicable) as a message and the latter from the one of logic, that is, as seen from the perspective of internal coherence and consequentiality of relevant contents. Yet, regarding either their *genus proximum* or *differentia specifica*, we have to realise that both their conceptual volume and extension will be different. For no norm can be found in a rule (or rules) but the mental reconstruction of its (their) message may generate one. Otherwise speaking, a rule may refer to a norm by forecasting the good chance that a norm can be reconstru(ct)ed through (as mediated by) it. For in itself, the rule is but a specific linguistic expression, while in logic an abstract logical relation is stated by the norm. Following this train of thought, we can also conclude that they are common in that, at least, none of them can stand by itself. A rule may come into being if thematised (expressed, declared, posited, enacted or promulgated, and so on) as such. And a norm may come to being in a somewhat reversed manner, namely, if a logical form is given to one or some of (parts of) the above in result of mental operations in intellectual (re)construction. All this notwithstanding, they are not and cannot be related as form and contents to one another.[20] Moreover, they are not co-extensive either. After all, rules differing by language, culture, structure and expression (etc.) may be logified as expressing the same norm and the same rule (in case of intentional or unintentional ambiguity, or with omission of punctuation or misprint, etc.) may serve for the reconstruction of differing norms.

[20] For the Hegelian-cum-Marxian use of this terminology, cf. Varga, Cs.: Autonomy and Instrumentality of Law in a Superstructural Perspective. *Acta Juridica Hungarica* 40 (1999) 3–4, 213–235 and Heuristic Value of the Axiomatic Model in Law. In: Raimund, J.–Lothar, Ph.–Schweighofer, E.–Varga, Cs. (ed.): *Rechtstheorieband* In memoriam Ilmar Tammelo (25. Todestag / 90. Geburtstag). Münster, etc., 2007 [in preparation].

5. The Uniqueness of Civil Law

In terms of what has been said above, it is the norm that has become the cornerstone of theoretical system-construction in our continentally rooted Civil Law, based upon the axiomatic inclination to logification. It is no mere chance that the construction of Kelsen's Pure Theory of Law as the form-giver of the continental legal arrangement[21] is founded on the *Grundnorm*, as it builds the derivation of validity throughout the entire prevailing law and order either on direct logical or indirect linguistic (conceptual) inference [*Ableitung*]. Accordingly, the norm is conceived as a logical unit which has been generated through logical reconstruction and can be subject to further logical operation. Therefore it is by far no chance either that both the need for and the conceptual performance of a doctrinal study of the law–with the call for a meta-system strictly conceptualised and rigidly logified upon the law (taken as a body of texts thoroughly consistent as concluding from the law's very components[22])–were formed within the sole domain of Civil Law.[23] (It is to be noted too that a theory of norms serving as a *Rechtsdogmatik* can be erected with no concept of

[21] Cf. Varga, Cs.: Hans Kelsen, a kontinentális jogi gondolkodás formaadója [Kelsen as form-giver of the continental legal thought]. In: Cs. Kiss, L. (ed.): *Hans Kelsen jogtudománya.* Budapest, 791–804.

[22] For the law's systemic property, cf. Varga, Cs.: A kódex mint rendszer (A kódex rendszer-jellege és rendszerként felfogásának lehetetlensége) [The code as a system: the systemic character of the law and the unfeasibility of conceiving it as a system]. *Állam- és Jogtudomány,* XVI (1973) 2, 268–299, and for the chance, as well as science-philosophical and science-methodological aspects of the doctrinal study of law, cf. Varga, Cs.: Jogdogmatika, avagy *Jurisprudentia* és társai – tudományelméleti nézőpontból [Legal dogmatics, or jurisprudentia and so on in a science-theoretical perspective]. In: *Jogdogmatika és jogelmélet.* Konferencia (2006. november 10–11.) a Miskolci Egyetem és a Miskolci Akadémiai Bizottság rendezésében: Programfüzet, 3–7.

[23] The predominance of the analytical method in applied legal philosophy and the thoroughly constitutionalised doctrine of the law in recent decades may suggest a trend greatly changed by today. Hence, the preference to analysis comes from an external interest, and the elitist (libertine) development of such constitutionalism as achieved by the US Supreme Court with academic assistance (i.e., by non-elected fora) has not yet exceeded the impact once exerted by the German doctrine on the English legal thought during the second half of the 19th century, which may have enriched Common Law in both theoretical interpretability and conceptualisation without, however, dissimilating it from its own traditions.

rule implied,[24] whilst a theory of rules dedicated to the law's phenomenal form can also be built upon the exclusive basis of norm-concepts.[25])

On the other hand, the culture of Common Law–which, instead of striving either for an exhaustive conceptual representation and textual embodiment (objectification) of the law, or re-establishing it according to axiomatic ideals, or also instead of reducing certainty of and security in law to logical deducibility from previously set propositions, focuses rather on the law's social and professional environment and the reliability of the former's responsible and responsive practice, on the rectifying medium of everyday experience and of feedbacks drawn from dilemmas of decision on the level of common sense as organically rooted in tradition, as well as on the force of social continuity able to framework both preservation and renewal in the law so far and in as much as it may be needed–does speak in terms of rules as an exemplification of the law, that is, as an accidental manifestation and incidental actualisation in situations when one has to declare what the law is actually.[26]

[24] Kelsen supplies an illustrative example by avoiding the use of 'rule' (except for the term 'rule of law' with 'rule' meaning just domination or control) in his final theory of norms [note 16].

[25] See below, note 30.

[26] This is well illustrated by the flow of literature covering the variety of areas and aspects of an academic interest in law which, historically drawing from the classical heritage of Jewish and Roman Law to span up to the present-day Anglo–American approach, uses exclusively the term of 'rule' as a phenomenal designation. Cf., e.g., D. van der Merwe '*Regulae iuris* and the Axiomatisation of the Law in the Sixteenth and Early Seventeenth Centuries' *Tydskrif vir die Suid-Afrikaanse Reg* (1987) 3, 286–302; Kalinowski, G.: L'interprétation du droit: ses règles juridiques et logiques. *Archives de Philosophie du Droit* 30: La jurisprudence, Paris, 1985, 171–180; Clanchy, M.: A Medieval Realist: Interpreting the Rules at Barnwell Priory, Cambridge. In: Attwooll, E. (ed.): *Perspectives in Jurisprudence.* Glasgow, 1977, 176–194; Campbell, I. D.: Are the Rules of Precedent Rules of Law? *Victoria University College Law Review* 4 (1956) 1, 7–27; Jackson, M.: Austin and Hart on Rules. *Edinburgh Philosophy Journal* (March 1985), 24–26; Rosenberg, I. M.–Rosenberg, Y. L.: Advice from Hillel and Shammai on How to Read Cases: Of Specificity, Retroactivity and New Rules. *The American Journal of Comparative Law* 42 (1994), 581–598; Frierson, C. A.: 'I Must Always Answer to the Law...' Rules and Responses in the Reformed *Volost* Court. *The Slavonic and East European Review* 75 (1997) 2, 308–334.

In contrast, even in hypothetical situations when some normative staff is expressed in a logifying context, one can mostly encounter a norm-concept to base explanations. Cf., e.g., Fikentscher, W.: *Methoden des Rechts* IV: Dogmatischer Teil, Tübingen, 1977, ch. 31, para. VIII: 'Die Fallnorm' and, in a particularly telling context, Hassemer, W.: Über nicht-juristische Normen im Recht. *Zeitschrift für Vergleichende Rechtswissenschaft* (1984), 84–105.

Yet, in a reverse sense, if rule is unconceptualised (without ever conceptually related, analysed and/or classified to the depth), that is, if neither logical conceptualisation nor any systemic idea stands in a determinative manner behind the practical act of giving it a linguistic form, that is, of denomination,[27] then it is to be doubted whether a *Rechtsdogmatik* can ever be erected upon such a scheme. For no doctrine on the internal connection and coherence and conclusion can be built without being based upon norms.[28]

If and in so far as the norm is logical a unit, the rule is nothing else than a kind of proposition. As to their respective environment, norms may stand both on their own and in a systemic context. On the other hand, rules do presuppose principles, standards and policies that can, without being rules themselves, demarcate the sphere of the said rules' relevance and/or applicability.[29]

It is for the "scientific" methodology of the doctrinal study of the law [legal dogmatics] to answer how and to which depth the unlimited (and in principle also illimitable) demand of logical correlation, consequence and coherence may (if at all) be complemented to with axiologically founded teleological considerations. Therefore, the introduction of either broader (socially sensitive) definitions (confronting, e.g., free-law movement to exegesis) or brand new aspects (by, e.g., teleological interpretation) in an established discourse within Civil Law may equally induce debates shattering the normativism's basic claim. In contrast, the a-scientific approach to law as paradigmatic of the regime of Common Law may openly admit that law can only cover (reach and challenge)

[27] Cf. Varga, Cs.: Codification à l'aune de troisième millénaire. In: *Mélanges pour l'hommage de Monsieur le Professeur Paul Amselek* (ed. Patrick Wachsmann et al.). Bruxelles, 2004. 745–766 and Codification at the Threshold of the Third Millennium. *Acta Juridica Hungarica* 47 (2006) 2, 89–117.

[28] A conclusion like this is facilitated by the unclarified English word usage and also by the fact that instead of any doctrinal study, it was the attempt at an axiomatical foundation of sciences–e.g., Moore, G. E.: *Principia Ethica* (1903) [cf. Varga, Cs.: *Lectures on the Paradigms of Legal Thinking*. Budapest, 1999, 120]–that became instrumental in developing the linguistic analysis of law in the Common Law world. This very fact has anticipated English legal analysis not to be based on the very law but on sample sentences either authorly hypostatised or–as the early criticism upon Herbert Lyonel Adolphus Hart's *The Concept of Law* had shown–although presented in a sociologising manner, yet actually constructed with no factual coverage whatsoever. Cf. Varga, Cs.: The Hart-Phenomenon. *Archiv für Rechts- und Sozialphilosophie* 91 (2005) 1, 83–95. For an exemplary elaboration, see Samuel, G.: *Epistemology and Method in Law*. Aldershot, 2003.

[29] Practically the entire oeuvre of Dworkin, R. M.–starting from his paper The Model of Rules. *University of Chicago Law Review* XXXV (1967)–serves just the explication of this.

the field of practical reason, within which–perhaps to our continental astonishment–sober everyday considerations are used to be given preference.

6. Ambivalence in Praxis

In sum, the dilemma of "rule and/or norm" carries marks of ambivalence inherent in coupling linguistic conventionalisation with attempts at theoretical (logifying and analytical) system-building upon it. (As a merely practical outcome, it is to be noted that albeit the Hungarian professional language usually refers to–by naming–legal rules, yet once they are subject to conceptual operation in doctrine, they are also treated as legal norms.[30])

On the final analysis, both can be used as conceptually justified in their own place and within their own context, respectively. For words in any language are used instrumentally and according to established habits, while concepts are formed as mental representations according to homogenising requirements set up by the given theoretical outlook and framework.

All in all, we have thereby justified the moment of identity, ambivalence and duality inherent in the terminological dilemma of "rule and/or norm". Despite any remaining conceptual uncertainty, we may find it fortunate that scholarship developed in both German and Hungarian language cultures belongs to the orbit of Civil Law, which makes an explicit difference in theory between the mere act of signalling the fact that there is a normative message made available and the logically processed conceptual embodiment (objectification) of such a message.

[30] E.g., Peschka, V.: *A jogszabályok elmélete* [The theory of legal rules]. Budapest, 1979. theorises upon norms exclusively [testified by its German version strikingly entitled as *Die Theorie der Rechtsnormen*. Budapest, 1982], after an obviously similar solution was already resorted to by Asztalos, L.: *Polgári jogi alaptan*. A polgári jog elméletéhez [A fundamental doctrine of the theory of civil law]. Budapest, 1987.

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PETRA LEA LÁNCOS*

Case Note: Sison v. Council[1]–Human Rights or the Fight Against Terrorism–Do We Really Have to Choose?!

On 1 February of this year the European Court of Justice (ECJ) in its capacity as an appeals forum to the Court of First Instance (CFI) passed yet another judgement relating to European acts containing lists defining persons suspected of association with terrorist activities. The judgement touches upon the important questions of access to documents of the European institutions as well as the human rights related to a fair trial and an effective legal remedy. It sheds light on the fact that although certain decision-making powers have been relocated to the European level, a parallel accommodation of legal protection has not followed suit thus leading to an unsatisfactory protection of human rights. In cases relating to terrorism, the European courts seem uneasy in applying the European Convention on Human Rights (ECHR) by which the Community is bound. This tendency creates serious discrepancies in the legal regime of an entity committed to the respect of freedom, human rights and the rule of law.[2]

1. Facts of the case

Professor José Maria Sison is the chief political consultant of the National Democratic Front of the Philippines in the peace negotiations with the Government of the Republic of the Philippines. After being released from Philippine prisons, he obtained refugee status in the Netherlands in 1988 and has been living there since. On 12 August 2002, the US Office of Foreign Asset Control listed Mr. Sison as a terrorist and ordered the freezing of his assets. Just one day later, without notice and without giving him the opportunity for a hearing

* Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg
E-mail: plancos@mpil.de, petralea@gmail.com

[1] Case C-266/05, Judgment of the Court of 1 February 2007–José Maria Sison v. Council of the European Union ("judgment"), *not yet reported.*

[2] Article 6(1) of the Treaty establishing the European Union (TEU).

the Dutch authorities listed Mr. Sison in a "sanction regulation against terrorism" ordering the freezing of his assets and the termination of all social benefits due to him. Two months later the Council of the European Union adopted Decision 2002/848/EC[3] linking Mr. Sison to the so-called New People's Army, a paramilitary communist revolutionary group classified as a terrorist organization by numerous countries as well as the EU[4] and listing him as a terrorist suspect in the meaning of Decision 2580/2001[5]–the basic European act for the purpose of combating terrorism. Two further Council decisions followed[6] repealing the decision establishing the original list; however, both new decisions maintained Mr. Sison on the list of suspected terrorists.

2. The applications

Under Regulation 1049/2001 on the public access to documents (Regulation)[7] which ensures among others natural persons residing in a Member State the right of access to documents of Community institutions[8] Mr. Sison requested[9] the Council to grant access to all documents that led to his inclusion and maintenance on the lists contained in the mentioned decisions as well as the

[3] Council Decision of 28 October 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/460/EC (OJ L 195 of 30 October 2002).

[4] http://en.wikipedia.org/wiki/New_People's_Army (3.03.2007).

[5] "Natural persons committing or attempting to commit an act of terrorism, participating in or facilitating the commission of any act of terrorism" Article 2 para 3 indent i) of Council Regulation (EC) No. 2580/2001 on specific restrictive measures against certain persons and entities with a view to combating terrorism (OJ 2001 L 344).

[6] Council Decision of 12 December 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/848/EC (Decision Nr. 2002/974/EC; OJ 2002 L 337) and Council Decision of 27 June 2003 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/974/EC (Decision Nr. 2003/480/EC; OJ 2003 L 160).

[7] Regulation (EC) No. 1049/2001 of the European Parilament and of the Council of 30 May 201 regarding public access to European Parliament, Council and Commission documents ("Regulation", OJ 2001 L 145).

[8] Article 2(1) of the Regulation.

[9] Confirmatory applications of 11 December 2002, 3 February 2003 and 5 September 2003.

disclosure of the identity of States submitting documents relevant in this respect.[10] With regard to each application the Council refused access to such documents, stating that these were classified as 'sensitive'' documents in the meaning of the Regulation[11] and even partial access would prejudice the public interest regarding public security, and further, that the disclosure of the identity of the submitting states would undermine the public interest relating to the soundness of international relations of the Union. The Council pointed out that the Regulation provides for exceptions in such cases[12] as well as in cases where disclosure has not been consented to by the originator.[13]

3. Findings of the Tribunal in the judgement under appeal (T-110/03)

Mr. Sison brought three successive actions before the CFI for the annulment of the Council decisions refusing access. The three cases were joined,[14] whereas the first case was declared as inadmissible and unfounded, the second as unfounded and only the third was dealt with in essence by the Tribunal. In the judgement under appeal the CFI in general noted, that "it must be accepted that the effectiveness of the fight against terrorism presupposes that information held by the public authorities (...) is kept secret so that (...) effective action can be taken."[15] The Tribunal further confirmed that "institutions enjoy a wide discretion" in justifying the refusal of access with reference to the public interest in areas covered by the *mandatory exceptions*[16] provided for by the Regulation.[17] It found that, consequently, judicial review of such decisions is

[10] Item 10 of the judgment.

[11] Article 9(1) of the regulation provides: "Sensitive documents are documents originating from the institutions or the agencies established by them, from member States, third countries or International Organizations, classified as 'TRÉS SECRET/TOP SECRET' 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4 (1) (a), notably public security, defence and military matters."

[12] Article 4(1)(a) of the regulation.

[13] *Ibid.*, Articles 4 (4)–(5).

[14] Joined cases T-405/03, T-150/03 and T-110/03, Judgment of the Court of First Instance of 26 April 2005–José Maria Sison v. Council of the European Union ("judgment under appeal") [2005] ECR II-1429.

[15] Item 77 of the judgment under appeal.

[16] Italics by me.

[17] *Ibid.*, item 46.

"limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated and whether there has been a manifest error of assessment of facts or a misuse of powers."[18] In particular it stated that the "Council was not obliged, under the exceptions provided for [by the Regulation], to take into account the applicant's particular interest in obtaining the documents requested", namely, that these were necessary for him to secure his rights to a fair trial in the proceedings before the CFI.[19]

3.1. The appeal before the ECJ

In his appeal against the judgements of the CFI, Professor Sison claimed that the ECJ set aside the contested judgements and annul the Council decisions refusing access to the requested documents, while the Council claimed the dismissal of the appeal.[20] As the appeals against the judgements of the CFI dismissing the first two cases as unfounded was dismissed by the ECJ as inadmissible for lack of arguments brought in the appeal against these, the Court solely dealt with the appeal against third case, notably T-110/03.[21] The appellant put forward five grounds of appeal centred upon his rights to a fair trial and access to documents, as well as the infringement of the duty to state reasons, the presumption of innocence and the right to an effective legal remedy. In its judgement the ECJ found one of the grounds for appeal inadmissible and all of the others unfounded, and it therefore dismissed the appeal.[22] In the following I shall restrict my analysis to the first ground for appeal related to the breach of the right to a fair trial and an effective legal remedy.

3.2. Breach of fair trial rights and the right to effective legal remedy

3.2.1. Arguments in appeal

In his first ground of appeal the appellant referred to the principle of a fair trial in general and defence rights in particular, as well as the right to an effective legal remedy. The appellant submitted that in the light of Article 6(3)(a) of the

[18] *Ibid.*, item 47.

[19] *Ibid.*, items 53 and 71.

[20] Items 21–22 of the judgment.

[21] *Ibid.*, items 23–24.

[22] *Ibid.*, item 109. In fact, ironically the Court even ordered Mr. Sison to pay the costs of the proceedings although all his assets had been previously frozen and all his social benefits had been cut.

European Convention on Human Rights (ECHR) on the right to a fair trial the Council is obliged to take into account his "legitimate interest in obtaining access to those documents, which concern him personally"[23] as "everyone (...) has the right to be informed (...) of the nature and cause of the accusation against him."[24] Further, according to Mr. Sison, in the light of the same provision the CFI infringed his defence rights by dismissing his actions, limiting its scope of judicial review and dismissing the fair trial argument, thereby also breaching his right to an effective legal remedy enshrined in Article 13 ECHR.[25]

3.2.2. Findings of the Court

Concerning the appellant's particular interest regarding the access to the documents in question, the ECJ pointed out that the CFI correctly observed that the purpose of the Regulation is to provide for general access to documents and not to "protect the particular interest which a specific individual may have in gaining access to one of them."[26] The Court found that exceptions contained in Article 4(1)(a) of the Regulation provide for a mandatory refusal of access "without the need (...) to balance (...) those interests against those which stem from other interests."[27] Thus, the ECJ goes on to state "even assuming that the appellant has (...) a right to be informed in detail of the nature and cause of the accusation made against him, which led to his inclusion on the list at issue" such a right cannot be enforced by reference to the Regulation at hand.[28] Exactly for this reason the Court rejected both claims regarding the infringement of defence rights and the right to an effective legal remedy. It seems to be saying that these rights cannot be exercised by recourse to the Regulation for the latter has not been designed for this purpose, and thus decisions denying access under the Regulation cannot result in a breach of such rights.

[23] *Ibid.*, item 28.

[24] Article 6(3)(a) ECHR reads: "Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him."

[25] Article 13 ECHR reads: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[26] Item 43 of the judgment.

[27] *Ibid.*, item 46.

[28] *Ibid.*, item 48.

3.2.3. Assessment

As a preliminary question it is important to note that not only the Member States but also the EC as well as "Community institutions are bound by the ECHR",[29] specifically, in accordance with the jurisprudence of the European Court of Human Rights.[30] As regards defence rights, arguments directly invoking the ECHR in cases before the European courts are admissible in so far as the Tribunal and the Court of Justice afford a "protection equivalent to that guaranteed by Article 6 of the ECHR".[31] However, it may be questionable whether the appellant may rely on Article 6(3)(a) ECHR in his case at all, for he has formally not been "charged with a criminal offence" as required by the Article and indeed, he was not facing criminal charges in any EU country.[32] However, in *Deweer v. Belgium*[33] the European Court of Human Rights pointed out that the word 'charge' constituted an autonomous concept of a much rather substantive than formal meaning, where for example the "situation of the suspect has been substantially affected."[34] It cannot be denied that the freezing of assets or the revocation of benefits constitutes such a substantial change. A

[29] Brown, L. N.–McBride, J.: Observations on the proposed accession by the European Community to the European Convention on Human Rights. *American Journal of Comparative Law*, 29 (1981) 695.

[30] „Where (...) an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice", Opinion 1/91, [1991] ECR I-06079; "The commitments emanating from the ECHR are already explicitly integrated in the EU treaties; they are an integral part of the community's legal order", Lerch, M.: European Identity in International Society–A Constructivist Analysis of the EU Charter of Fundamental Rights, *Constitutionalism Web-Papers*–ConWEB No. 2/2003 (note 12), at 6; see further: Lavranos, N.: Concurrence of jurisdiction between the ECJ and other international courts and tribunals, EUSA Ninth Biennial International Conference (31. 3.–2. 4. 2005), Texas, 17; see also the Charter of Fundamental Rights Article 52(3) and its commentary, Borowsky, M.: Tragweite und Auslegung der Rechte und Grundsätze, marginal notes 10, 29, 30, 37, in: Meyer, J. (ed.): *Charta der Grundrechte der Europäischen Union*, Baden-Baden, 2006.

[31] Case T-112/98, Judgment of the Court of First Instance of 20 February 2001–Mannesmannröhren-Werke AG. v. Commission of the European Communities [2001] ECR II-729.; see also: Brown, McBride, *op. cit.*, 695.

[32] http://www.statewatch.org/news/2004/nov/sison-application-2-T-150.pdf (24. 05. 2007), 4.

[33] Judgment of the European Court of Human Rights, *Deweer v. Belgium*–6903/75 [1980] ECHR 1 (27 February 1980).

[34] Peukert, W.: Artikel 6 (Verfahrensgarantien), marginal note 48, in: Frowein, J. A. and Peukert, W.: *EMRK-Kommentar*, Kehl, 1996.

further qualification is that the reason for such a 'charge' must be a criminal offence, thus protection under Article 6 ECHR is guaranteed in all cases where the act allegedly committed by the suspect is deemed criminal in the legal order of the jurisdiction in question.[35] It is obvious from the preamble of Council Regulation No. 2580/2001 on combating terrorism[36] that terrorism constitutes a criminal act under European law. It follows, that both the Council and the Tribunal are fully bound by the fair trial rights enshrined in the ECHR which may further be invoked before the CFI and the ECJ. Thus, it seems that the Court's brief hint in the judgment to the contrary ("even assuming that the appellant has (...) a right to be informed in detail") is undue and Article 6(3)(a) applies in full.

As regards the concurrence of the CFI and the ECJ in stating that the purpose of the Regulation is not to protect particular interests in obtaining access to documents, this statement holds true; however, this does not mean, that human rights do not figure in cases where a certain legislative act is not explicitly designed to consider, or does not even mention, human rights. Although it is correct that fair trial claims may not be based on the Regulation itself, the 'mandatory refusal' provided for by Article 4(1)(a) of the Regulation cannot hold without an at least possible exception for human rights. Consequently, the Council cannot use a specific 'blanket' provision of the Regulation to rid itself of the duty to respect human rights in general, and the right to a fair trial in particular. It follows that the Council cannot dispense with balancing public interests against "other interests" such as those related to securing the defence rights of the appellant.[37] Naturally, the Council may still arrive at the conclusion in the individual case that the public interest as regards for example public

[35] *Ibid.*, marginal note 35, see further: http://www.legislationline.org/?tid=105&jid=60&less=false.

[36] See recitals 1 and 2 of Council Regulation No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344); Peukert, *op. cit.*, marginal note 36.

[37] Effective legal remedy requires that "the question whether the impugned measure would interfere with the individual's [specific human] right (...) and, if so, whether a fair balance is struck between the public interest involved and the individual's rights must be examined." Cameron citing the Judgment of the European Court of Human Rights, *Segerstedt-Wiberg and others v. Sweden*–62332/00, *not yet reported* (6 June 2006), in: Cameron, I.: The European Convention on Human Rights, due process and United Nations Security Council counter-terrorism sanctions, Report prepared for the Council of Europe (2006), http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/Texts_&_Documents/2006/I.% 20Cameron%20Report%2006.pdf (24.05.2007), 20; see also: Borowsky, *op. cit.*, marginal note 21.

security justifies a proportional restriction of the individual interest in gaining access to documents which may prove necessary for the realization of defence rights. At the same time, the legal review of the decisions of the Council and the judgement of the CFI may lead to a different result should the Regulation not be interpreted by both judicial instances as excluding a balancing of interests.

In accordance with the above, the Tribunal is also obliged to respect fair trial rights guaranteed by the ECHR. Defence rights guarantee, among other things, that the party to the proceedings is granted "sufficient, adequate and equal opportunity to deliver statements both factually and in a legal sense, and that the party is not put at a disadvantage in comparison to the other [party]."[38] As the ECJ points out, contrary to the assertion of the appellant its defence rights had not been denied by the CFI in the sense that the arguments put forward by the appellant had been indeed considered and *then* dismissed.[39] However, an other aspect of the right to a fair trial is the principle of 'equality of arms' which requires "that all *material* evidence *for or against* the accused must be disclosed to the defence"[40] except in cases where measures restricting disclosure are strictly necessary, with the further qualification that "if a less restrictive measure can suffice then that measure should be employed."[41] The latter requires that the proceeding court has the means to establish whether the refusal of disclosure was strictly necessary and proportionate.

Based on the above it is questionable whether the appellant's right to an effective legal remedy as provided for by Article 13 ECHR has not been violated.[42] It is important to note that the right to effective judicial protection under the ECHR is bound to the breach of a particular human right under the same Convention. The appellant claimed that he had been denied an effective legal remedy against the breach of his right to be informed in detail of the cause of his inclusion on the lists in question, which also entails disclosure of evidence in this respect. As noted above however the ECJ found no breach of the right to be informed in detail. Referring to the fact that no breach of a human right under the Convention has taken place, the Court seems to be saying that this fact excludes the possibility of an infringement of the right to

[38] Peukert, *op. cit.*, marginal note 72 (my translation).

[39] Item 50 of the judgment.

[40] Cameron, *op. cit.*, 13 (italics in the original).

[41] *Ibid.*, 14, citing the Judgment of the European Court of Human Rights, *van Mechelen and Others v. Netherlands*–21363/93; 21364/93; 21427/93 and 22056/93 [1998] 25 EHRR 647 (23 April 1997).

[42] In general see: Biernat, E.: The *locus standi* of private applicants under article 230 (4) EC and the principle of judicial protection in the European Community, *Jean Monnet Working Paper* 12/03, 22–23.

an effective legal remedy,[43] that is: the lack of breach of a specific human right *per se* excludes the infringement of Article 13 ECHR and therefore also dismissed this part of the appeal. However the Court unduly applied a 'shortcut' in reviewing whether the right to an effective legal remedy has been breached by the CFI. The starting point of the review should not be the determination of whether the right to a fair trial (here: the right to be informed) has been breached or not and drawing conclusions therefrom regarding the infringement of Article 13 ECHR. Rather, the object of the review should have been the proceedings of the first instance court, the examination of whether it provided an effective legal remedy in assessing the breach of the appellant's right to be informed by the Council. Even more so, as the right under Article 13 presupposes merely an "arguable claim"[44] instead of an established breach of a right under the Convention exactly because the right to an effective legal remedy is meant to facilitate the assessment whether such a breach has occurred at all. The right to an effective legal remedy not only secures the right to bring a case before a legal forum but also that the remedy provided by the latter is 'effective' in the sense that a "competent, independent appeals authority must exist which is to be informed of the reasons behind the decision, even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to (...) security where it finds it arbitrary or unreasonable". Albeit states (and *mutatis mutandis* also the EC) have a "margin of appreciation in how they apply Article 13" especially in areas concerning public security, judicial remedy must still be afforded, and this "must be effective in practice as well as in law".[45] Thus, Article 13 ECHR requires that minimally the proceeding court has access to documents based on which it may establish whether claims exacting secrecy are well founded[46] for "where a national authority does not take sufficiently into account, or is not capable of taking into account, the substance of the individual's arguable *claim* that his or her Convention rights have been breached then there has been a breach of Article 13."[47] Consequently, the review of

[43] Item 52 of the judgment.

[44] Frowein, J. A.: Artikel 13 ("Beschwerderecht"), marginal note 2, in: Frowein, J. A. and Peukert, W.: *EMRK-Kommentar*, Kehl, 1996.

[45] Cameron, *op. cit.*, 20.

[46] As Cameron points out "the (minimal) controls which operate in general on collection and transmission of security information could not compensate for the total absence of effective judicial remedies," that is the conduct of the executive must be subject to possible judicial review. *Ibid.*, 12–13.

[47] *Ibid.*, 19, referring to the Judgment of the European Court of Human Rights, *Klass and other v. FRG*–5029/71 [1978]2 EHRR 214 (6 September 1978) (italics in the original), 19.

whether the CFI has afforded effective judicial remedy as regards the arguable claim relating to the breach of Article 6(3)(a) must entail the assessment whether the Tribunal has accessed the necessary information and examined the proportionality of the contested decision.

Conclusion

It seems that the European courts are yet uncertain in how to apply human rights in cases that relate to the fight against terrorism. The *Sison* case is a good example of this tendency: both the CFI and the ECJ unduly limit their scope of review according the Council excessive discretion in refusing access to documents, which leads to unsatisfactory results as regards the protection and the enforcement of human rights. As Cameron points out, "there are unfortunately many examples of purely formal mechanisms of challenge as far as security matters are concerned", which give the illusion that human rights have been safeguarded, whereas in reality they have been mocked by faint proceedings. This way, there may be even more harm done than good[48] for the EU in general and the victims of human rights infringement in particular.

[48] *Ibid.*, 14.

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BOOK REVIEWS

Lőrincz Lajos: **A közigazgatás alapintézményei** [The Basic Insitutions of Public Administration]. HVG–ORAC, Budapest, 2005. 406 pp.

The experiences of human history demonstrate that at times the leading forces of societies need to pause and retrospect, evaluate the present and outline the future, since the future is obviously anchored in the past, or more precisely, in the present. Thence, the evaluation of "the present" will necessarily result in a conspectus, scilicet, a conspectus of the available, or favourably, accessible facts, circumstances, experiences and knowledge in the specific framework.

I may not be incorrect, if I simultaneously contend, as a university professor dealing with public administration for more than two decades, that in our own (personal) lives peculiar situations ensue or might ensue, when we must also pause and accomplish what no one else can objectively effect, including our colleagues most familiar with our achievements. Scilicet, a conspectus or summary of our theoretical and practical knowledge acquired and scientific achievements attained during the recent years or decades. That is, the commitment to the writing of all the knowledge which perforce we master most.

Initially, these were the thoughts that entered my mind, when I took "The Basic Institutions of Public Administration" by Lajos Lőrincz into my hand and read the work, which was published possibly not unintentionally upon the 70th anniversary of the birth of the author.[1] All along, it gave me the impression that I was holding an oeuvre, *a kind of conspectus* on public administration, and not merely Hungarian public administration, in my hand. A conspectus, which intends to provide a comprehensive and complex introduction to the basic institutions of public administration for the first time since the publication of the textbook of Zoltán Magyary in 1942 titled "Public Administration in Hungary". *Complexity* in this case implies that upon the introduction of basic institutions, the author endeavoured (with success, I might add) to consider the achievements of all sciences concerned with public administration, including those of legal and political sciences, the sciences of

[1] The volume was published by HVG–ORAC Publishing House Ltd. in exacting finish.

administration, sociology and psychology and comparative sciences. In my judgement, however, complexity marks the volume not only by reason of the consideration of the achievements of sciences concerned with public administration from various points of view, but also in the sense that besides drawing on the results of Hungarian special literature, the author works through the American, German and French special literature concerning public administration uniquely from a Hungarian point of view.[2]

The title projects the introduction of the basic institutions of public administration, hence, it is regarded important, on the one hand, what the author defines as the concept of public administration, and on the other hand, what the author deems to be "the basic institutions" in the context of public administration. As a matter of fact, this complex question can be answered as follows:

As to the first part of the question, we can establish that *public administration* implies a specific activity of the state carried out by a specific group of experts working in a specifically structured organisation. Thus, public administration can be most clearly described through the detailed introduction and analysis of these three elements, i.e., activity, organisation and staff, which is to be construed as the generic term of state and local administration in a democratic state founded on the rule of law.

As to the other part of the question, *the basic institutions of public administration* are considered to be the three referred to elements of public administration, i.e., activity, organisation and staff, complemented by two further essential elements. One of these, or, if it suits your convenience, a starting point is that public administration is never realised or operates in a vacuum, but in a particular social environment, thus, the introduction of the real character of public administration requires the analysis of the system of relations with respect to that social environment. The other further element is the circumstance, that in modern societies public administration as to its organisation and functions cannot be distinctly separated from its environment, that is, on the frontiers of public administration we can find several so-called para-

[2] In recent years, primarily in the spirit of the accession of Hungary to the EU, more and more studies were published, which examine various legal institutions from a Hungarian point of view. Let me adduce the following two works: Kecskés, L.: Tézisek az Európai Közösség jogáról és a jogharmonizációról – immár magyar szemmel is (Theses Concerning the Law of the European Community and Legal Harmonisation, by This Time from a Hungarian Point of View). *Jogtudományi Közlöny*, 52 (1997)181; Pap, L.: Az Európai Bíróságról – magyar szemmel (Concerning the European Court from a Hungarian Point of View). *Jogtudományi Közlöny*, 53 (1998) 107.

administrative organs. These para-administrative organisations–also described as "non-administrative organs similar to administrative organs"–carry out public (administrative) activities.

According to the explication above, the basic institutions of public administration are adumbrated as follows:

1. public administration and its social environment,
2. the organisation of public administration,
3. the activities of public administration (functions and duties),
4. organs that constitute the frontiers of public administration and their activities (para-administration),
5. the staff of public administration.

This list constitutes not a random, but instead logical system. It creates a natural, substantive order, which the author properly constructs and forms the structure of the volume. Therefore, the oeuvre of more than 400 pages consists of five great structural parts.

Part 1: Public Administration and Its Social Environment

The substrate formula is given: public administration is always realised in a particular social environment, therefore, the provision of an insight into this environment as a theoretical foundation is reasonable before the detailed introduction of the three elements of public administration. In this process, the author deals with three main issues:

1. Which sciences, from which viewpoint and which methods deal and have dealt with public administration?
2. How does (and has) the relation of public administration to the economy and politics develop(ed)?
3. Does public administration have basic principles, and if so, what are these and what is their significance?

Ad. 1. Sciences concerned with public administration

Public administration can be defined as a form of the appearance of the state for the majority of people, and as the author remarks, reasonably, it implies the state per se as the organisational and personal framework operating for several thousand years, which has secured the subsistence of human communities via its organisational work. This, according to the rules of formal logic, would entail that the science of public administration also dates back several millenia. More precisely, we could assume that the science of public administration as a

systematic synthesis of knowledge pertaining to public administration, which progressively affects its subject matter, has developed over several millenia.

In fact, however, at least in Europe, the science of public administration as opposed to classical natural sciences emerged relatively late, around the end of the 18th and beginning of the 19th centuries, that is, the time of the decline of feudal absolutism, which was closely related to the accretion of the property of the monarch and to the bourgeois transformation of society. The work of scientists dealing with public administration for two hundred years is assessed by the author in the following manner:

A) Scientists dealing with public administration:
The respective authors study the functions, organisation and the environment of public administration directly, and actually assume that no significant difference obtains between the administration of the public and private sectors. The current framework of this science has evolved as a result of the long and organic development of the following branches:

a) cameralistics and the science of policing (J. H. Justi, J. Sonnenfels),

b) theory of public administration (L. Stein),

c) theory of administration (H. Fayol),

d) the American theory of public administration (F. Taylor, L. Urwick, L. Gulick, H. A. Simon).

B) Theorists of legal science dealing with public administration:
The respective authors have focused not on public administration and its environment, but instead on law pertaining to public administration. More precisely, these authors have studied public administration not directly, but via pertinent law, and consequently, arrived at their conclusions. Thereby, it is understandable that the prerequisite for the emergence of this branch was the evolution of the separate area of law settling basic problems of the organisation, activity of public administration and relation between citizens and public administration, i.e., the law of public administration. It was first in France at the beginning of the 19th century that this branch emerged, nevertheless, a German scientist, Otto Mayer played the most prominent role at the turn of the 20th century.

C) Theorists of political science:
Law regulating public administration only had a role on the Continent. In Anglo-Saxon states, by reason of the different development of the legal system, it was superseded by political science, which was designed to provide theoretical support to the practical administration of state affairs, i.e., governance. Its foundations were laid by W. Wilson.

A common feature of the sciences dealing with public administration mentioned so far is that their prominent field of research is public administration. The same applies to *comparative public administration* as the most powerful branch in our days.[3] That does not obtain with respect to the following sciences (although, their fields of research undoubtedly cover public administration): sociology, psychology, economics geography, etc. As the author also asserts, a further fact is that the mutual interaction of diverse fields has increased in recent decades; research in law and political science intertwines with sociology, research in the science of administration with psychology, etc.

Ad. 2. The relation of public administration to the economy and politics[4]

In this chapter, the author starts from the fact that although, public administration has continuously changed, it has retained its essential features and relative autonomy throughout the ages. Its essence has changed, but not dissolved, since it has remained an organisational activity carried out in favour of the realisation of the will of the people. Regarding the changes, both the economy and politics have a decisive role, but undoubtedly, other circumstances, such as historical traditions or the geographical situation of the specific state also influence the formation of public administration.

The author treats the effects of the economy and politics on public administration in separate chapters, while emphasising that economic and political factors do not equally affect the three elements of public administration: its organisation, activity and staff.

A) The system of relations between the economy and public administration
In the context of relations between economic factors and *the organisation of public administration*, the author indicates that the concentration of production verifiably led to an increase in the quantity of the duties carried out by public administration and the centralisation of the administration of affairs by the

[3] When I stated above that the oeuvre subject to the current review is a kind of conspectus, I could have adduced the former works of Lajos Lőrincz to substantiate my statement. I didn't do so, since I consider the method in which I draw the reader's attention to the various works and studies in relation to the specific issues more expedient. Well, the author published a separate study concerning the substance of comparative public administration, as well. See: Összehasonlítás a közigazgatásban (Comparativeness in Public Administration). *Magyar Közigazgatás*, 49 (1999) 225.

[4] In this area, the author published a monography in 1981. See: *A közigazgatás kapcsolata a gazdasággal és a politikával* (The Relation of Public Administration to the Economy and Politics). Budapest, 1981.

state. However, the increase in quantity did not result in the transformation of the quality of the entire organisational system of public administration, as the core of the organisational system has remained unaltered since feudal absolutism. Namely, no substantial changes have occurred in the organisation of the administration of foreign affairs, finance, justice and defence. The situation is different in other areas of public administration, i.e., concerning economic, commercial and cultural affairs, where changes both in quality and quantity have occurred. It is necessary to emphasise changes in quality, since the so-called duty-performing, new types of organs of public administration, can be clearly distinguished from the traditional formalist, inflexible organs of public administration threatening with sanctions and organised in a nationally unified hierarchy, scilicet, from the authority. As the author formulates, "the authority is splendidly structured to perform administration, although inadequate to perform duties in the areas of the economy, culture and social life". (p. 47) Its consequences are assessed in Part 4 of the volume discussing para-administration.

Changes are also palpable in the context of the relation between economic factors and *the activity (functions) of public administration*. The process of globalisation that ensued in economic life, has obviously and powerfully influenced the functions of public administration, primarily manifesting itself in an increase in the function of the provision of services. An array of public administrative functions and duties have appeared, which had formerly been inconceivable, such as national planning, appraisement and rational utilisation of various resources, financing scientific research, subvention of crucial areas of production by the state, securing the balance of production and consumption, etc.

With regard to the relation between economic factors and *the staff of public administration*, the author sets forth that in the second half of the 19th century, the respective staff was recruited from the middle class, in which the disposal of certain property and an educational level far above the average were a priori given. The decisive change ensued following the 1st World War, when parallelly with a change in quality, the moderate increase in the number of staff before the turn of the century accelerated, which was closely related to the accrual of public administrative duties. Civil servants were progressively recruited from the lower strata of the middle-class and the standard of education also descended.

B) The system of relations between politics and public administration

As it is publicly known, the political system is a complex establishment, in which certain elements, i.e., the parties, the state and the political ideology

are not equally momentous. The most significant force is represented by *the political parties*, since within a democratic framework, it is exclusively these organisations having the direct objective of obtaining and retaining state power. The parties with a modern structure emerged in the second half of the 19th century, after the basic principles of the establishment of the bourgeois state had been laid down and the institutional safeguards of the division of power had been established. In developed states, two types of party systems have developed and function currently. In the USA and Great-Britain, two-party systems, whereas in other Western-European states, multi-party systems were established, which has apparently affected public administration, as well.

In states with two-party systems, the party that wins the elections exercises exclusive (state) power, as if a one-party system prevailed in the specific country. In principle, the legislative and executive powers (public administration) are separated, although in actual fact, both are the organs of the winning party, that is, parliament and government are propelled by the same power.

In states with multi-party systems, the classical principles and institutions of the division of power markedly manifest themselves. Parliament has a greater scope of action in comparison with government, in addition, a kind of vertical structure also appears, so far as the coalition parties predetermine, which administrative branches they intend to control.

As a matter of course, the relation between the party and public administration is the most compelling in countries with *one-party systems*, as it was manifest for instance in Hungary before the political transformation.

Besides or beyond the problem of party struggles, the issue of *the relationship between the staff of public administration and parties* is also unavoidable. This issue is analysed in a separate chapter, which departs from the fact that the relation between public administration and the parties is particularly close with regard to their staff. In this respect, the question arises as to what extent parties can influence the staff of public administration so as to attain their objectives. In this respect, three solutions obtain globally. According to the first one, the staff is entirely politicised, that is, the positions in public administration are occupied by members or supporters of the political party in power (prize system). A clear example in this respect is the USA. According to the second solution, the staff is politically neutralised, that is, shielded or protected from any political influence (career structure). As an example, we can mention the United Kingdom before 1945. The third solution represents an in-between form, which combines the two former models, a commonly cited example of which being the system in France.

Ad. 3. The basic principles of public administration

According to the author's allusion made among his introductory thoughts, special literature is rather divided concerning the basic principles. Even the question is subject to debate, as to whether public administration has basic principles, and if so, what their significance and functions are.

Nevertheless, the author's standpoint is unequivocal: public administration does have basic principles, and as such, they are indispensable, politically marked scientific constructions. Furthermore, they frame the essence of social expectations with regards to public administration. In this sense, the basic principles are norms, according to which the realisation of the conceptions of political leadership can be measured. The basic principles manifest the desired reality: their roles consist in motivation, reality formation and orientation.

According to the standpoint of the author, which I do not question, two basic principles embody the requirements concerning contemporary public administravtion as reflected in the experience throughout the history of development of public administration: namely, democratism and the effectiveness of public administration.

A) The democratism of public administration

The traditional form of democratism as the rule of the majority is discernible only to a limited extent (through public bodies) in the case of public administration construed as a peculiar system of state organisation exercising public authority. The democratism of public administration implies its limited and controlled nature. Thus, democratism doesn't consist in an internal operative principle of public administration, but *it is the principle of the exercise of power vis-a-vis public administration*. In the ensuing text, the author also sets forth that, although the instruments and manners of the enforcement of the democratism of public administration may be multifarious, they can be classified. A part of them represents the direct safeguards of democratism, while the other part indirectly contributes to the social control of public administration. In the scope of *direct manners*, the author mentions and analyses participation and the openness of a career in public administration as basic principles, whereas, in the scope of *indirect manners*, work in the public interest, subjectedness to law and transparency are mentioned. An exhaustive discussion of these basic principles and requirements exceeds the scope of the present review. Notwithstanding, I must assert that on the one hand, I completely agree with the explication of the author, and on the other hand, the majority of the principles treated by the author were framed as the basic principles of "good governance" in a document of the European Committee as a requirement to be

complied with by the institutions of the European Union and the public administration of member states. According to the European Committee, the basic principles of good public administration are the following: openness, participation, accountability, effectiveness and coherence.[5]

B) The effectiveness of public administration

In general, effectiveness implies consideration of the relative statistic deriving from the comparison of the effort made to attain a specific objective with the reached achievement. In the area of public administration, the issue of effectiveness was raised quite late, after the 1st World War, by the science of administration. The reasons for that include the monopoly of public administration and its subjectedness to politics.[6] As to public administration, we need to distinguish extraneous and intrinsical effectiveness. Extraneous effectiveness can be measured with respect to society and its norm is satisfaction, which is difficult to measure. Whereas, intrinsical effectiveness is easy to measure, since this is encompassed in the area of the organisation of work.

The author concludes the discussion of the two basic principles of public administration, i.e., democratism and effectiveness by establishing that these principles are closely interrelated. Public administration that is lavish, slow and negligent, cannot be democratic, since it fails to meet the most basic expectation of society. Simultaneously, public administration that lacks democratism cannot be effective, since it excludes the population that it is destined to serve from the administration of affairs, preparation and control.

Part 2: The Organisation of Public Administration

The author treats the issue of organisation, the first component of public administration, in two greater contexts. First, he introduces the results of the pertinent research of various sciences, and he then classifies and treats the system of organisation in a detailed manner, distinguishing the central and local organs of public administration.

[5] See: White Paper on European Governance. The document was issued by the European Committee in June, 2001.

[6] On effectiveness, *see* more amply the following study by the author: A hatékony állam (The Effective State). *Magyar Közigazgatás*, 55 (2005) 449.

A) Sciences concerning the organisation of public administration

Formerly, I referred to the fact that sciences dealing with public administration from disparate points of view introduce new aspects of the actually complex system of organisation, activities and staff. This statement is valid not only in general, but also specifically with respect to organisation. What I am referring to is that, concerning the organisation of public administration, the author presents the most important assumptions of political science, legal science and the science of administration and sociology in an exhaustive manner. Let me point out the following ones:

a) Political science and legal science describe the organisation of public administration by comparing it to other organs participating in the exercise of state power, thereby, drawing on conclusions as to its features. According to the author, these features are best apprehended through the examination of the decisions of representative organs and the opportunities for the application of coercive measures of the state. The society is interested in the control of this power, i.e., of public administration, therefore, the law must ensure, on the one hand, the subjection of administrative organs to representative organs, and on the other hand, the protection of citizens vis-a-vis the unlawful acts of public administration.

b) As opposed to both political and legal science, *the science of administration* studies the intrinsical features of the organisation of public administration; that is, it lays the emphasis on the system of relations within and among the organs. It recognises two structures considering the development of the organisation of public administration: a vertical and a horizontal structure. The vertical structure derives from the establishment of mediating organs between the centre of government and settlements with dual functions; that is, the mediation and enforcement of central decisions and the collection and transfer of local information. The horizontal structure evolved during a later stage of historical development; that is, at the time of feudal absolutism. It entailed a higher degree of the division of labour, which was initially realised only at the central level via the establishment of the basic types of ministries, such as the ministries of foreign affairs, defence, finance and the interior. At a later stage of development, primarily as a result of detachment from the branch of internal affairs, a sharp increase is noticed in the number of ministries, which resulted in an almost unsolvably difficult coordinational task in the prevailing top organ of public administration.

c) Sociology describes public administration as a bureaucratic type of organ by underlining its respective features: written rules, the principles of hierarchy and official trips, and officialism. The author also mentions that the reasonableness of certain tenets of the bureaucracy-model contended by Max Weber was in many

respects challenged by later research. As an example, he refers to the research carried out by Elton Mayo, who proved that, besides the structure set forth under formal rules, an informal structure can also be discerned in the organisation.

B) The classification of administrative organs

A wide range of public administrative organs work in all countries, therefore requiring classification of their description and apprehension. This is feasible in numerous manners, depending on the aspect according to which systematisation is accomplished. The author selected the *area of activity* of the administrative organ as a criterion for classification and accordingly, distinguished central and local organs of public administration.

Notwithstanding, as the author correctly indicates, *central organs* do not represent a homogenous organisational system. Therefore, he firstly presents a typology of central organs, and then introduces ministries, national supreme authorities, the government and its organs in an exhaustive manner. Regarding the *typology*, we need to point out that two models obtain with respect to the executive function in the world: the dualist and the monist models. According to the dualist model, both the head of state and the prime minister are responsible for execution, whereas, according to the monist model, the prime minister and the executive organisation clustering round him exclusively bear the responsibility.

The author dedicates a separate chapter to the introduction of *ministries and national supreme authorities*, which is justified by the obvious significance of these public administrative organs. In this scope, the author classifies ministries and distinguishes between stable and changing ministries, ministries directly related to the activity of government and ministries performing execution, and he then introduces various structures in ministries, such as the classical and the Swedish model. Furthermore, he discusses the issue of their direction, i.e., the organs of shaping politics and the organs of execution in ministries. Even his adumbrative account of these exceeds the currently available scope. Nevertheless, we should note the fact that the author treats these issues not only in general, but also devotes focus to Hungary, whilst not neglecting the historical approach.

Also reasonably, the author devotes a separate chapter to the *government and its organs,* specifying various kinds of governments, structures and activities of governments. His methodology resembles the one applied in the case of ministries, and as such, he proceeds from the general towards the particular through the apprisingus of various governmental systems, as well as Hungarian solutions using a historical and legal historical approach.

Regarding the *local organs of public administration*, the author starts the discussion with the clarification of principles and concepts. He considers local administration in a kind of theoretical work on the subject, and then renders his interpretation of the concepts of centralisation, deconcentration (the establishment of local organs of central administration) and decentralisation. Finally, with a focus on Hungary, the author discusses the issues of both deconcentration (establishment of the local organs of central administration) and local governments in separate sub-chapters.[7]

Part 3: The Functions and Duties of Public Administration

Public administration is not only an organisational system structured according to specific principles, but it is also an organisation performing specific functions and duties. Functions and duties, as the author sets forth in the introduction, are terms with different implications, although, they are often treated as synonyms. Function is a more general and broader term; it defines the essence of the social designation of the organ. Duty, however, reflects comparatively more specific tasks, the performance of which leading to the accomplishment of function. According to the method applied formerly, functions and duties of public administration are discussed with respect to the fields of political science, legal science and the science of administration and sociology, with the author drawing on an enormous apparatus of special literature. The essence of his statements can be summarised as follows:

A) Regarding the approaches of political and legal sciences
According to the classical definition, the function of public administration consists in its *execution*. In the system operating with the division of labour among various types of state organs, the function of representative organs is legislation, the function of courts is administration of justice, whereas, the function of public administrative organs is the enforcement of law; that is, realisation of decisions made by political organs via the implementation or performance of three duties with specific content, i.e., law-making, application of the law and organisation.

[7] The author examined these issues in various studies formerly. Among these, I'll highlight the following one: *Magyar közigazgatás: dilemmák és perspektíva* (Public Administration in Hungary: Dilemmas and a Perspective). Budapest, 1988.

B) The science of administration concerning the functions of public administration

The science of administration focuses on organisation as a specific activity. As Fayol and Gulick demonstrated, organisation is not a homogenous human activity, since it has *disparate elements*. According to Fayol, these are planning, commanding, coordination and supervision, whereas, according to Gulick these include planning, organisation, staff matters, direction, coordination, reporting and budgeting. The latter viewpoint gained ground in special literature as POSDCORB, which equals the joined initials of the elements. Having worked through the achievements of recent special literature, the author analyses the most important elements of organisation, i.e., planning, decision-making and supervision, in a detailed manner.

C) The functions of public administration according to the sociological approach

The majority of authors enforcing a sociological approach, e.g., Max Weber and Michael Crozier, agree as to the distinction between standard and variable functions of public administration. *Standard functions* prominently include these of protection and meeting demands. *Variable functions* cannot be so distinctly separated, since their peculiarity is that they vary according to time and space. The author mentions the public administrative system of ancient Egypt as an instance, the decisive functions of which included planning and establishment of the watering system and the organisation of water management.

Regarding the functions of public administration, sociology has also elaborated on a further categorisation. Accordingly, public administration has dual functions: integration and allocation. Via the *integrative function*, public administration attempts to channel the extremely multifarious interests manifest in society towards the attainment of objectives declared to be in national, local or social interest. Without integration, the society would be decomposed to its elements and social peace would become vulnerable. Alternatively, the essence of the *allocative function* is the allocation of social resources to social activities and institutions for the purpose of attaining the objective of integration.

Part 4: Para-Administration

The word "para" of Greek origin is used as the anterior constituent of compounds and denotes the similarity (to something) of the term connected to it; for instance, para-military. The study of public administration from multiple viewpoints as presented above has demonstrated that, as I pointed out in the introduction,

public administration cannot be distinctly separated from its social environment, since on its frontiers, as the author puts it, we can find organs that attend to public (administrative) duties, which are not actually public administrative organs, but merely similar to them. These are para-administrative organs; the number and significance of which having increased from the second half of the 20th century.

A) The manners in which public duties are performed

Before the discussion of these manners, the author departs from the statement that one of the principal duties of public administration is the organisation of various public services, such as water supply, education, health care, energy supply, construction of public roads, etc. The range of these services has extended throughout history with the express demand of the members of societies. This has led to a situation, which the author describes as follows: "we justifiably designate the public administration in our age as a provider of services or an organiser of services". (p. 242) *Public administration performs its duty to provide services in three main manners.* Firstly, *it attends to its duties itself* either via its specific, bureaucratically structured organs, on which public authority is conferred, or via its official apparatus. This range includes duties which manifest that public administration is a public authority, e.g., keeping basic records, issuance of certificates and documents, licensing and the application of state sanctions. Secondly, for the purpose of performance of duties, *it establishes institutions, so-called public institutions*, on which it confers the duty of the provision of public services. Thirdly, *it transfers the performance of a duty to an organ in the private sector.*

The common feature of public duties belonging to the second and third categories is that these are economic and material services, and therefore in these cases public administration undertakes a different role from the one of a public authority in the first category. The classical organs of public administration do not have either the power or the preparedness to provide economic services, although they are responsible for their accomplishment.

B) Factors determining the manners in which public duties are performed

It is a fact that in all countries of the world, each of the three manners in which services are provided is applied, although their relative proportions are quite variable. According to the author, the selection of each of the solutions in a specific state is determined by the geographical position of the country, prevailing political-idological differences and fashionable trends.

So far as *the geographical position of a country* and the prevailing political-ideological differences are concerned, it is worth mentioning the USA, where

liberalism determines both the economy and politics. Its consequence is that, in the area of the provision of public services, public property is restricted to the narrowest scope: public services are provided by both organs founded on private property and private associations, while state control and supervision are maintained. In Europe, however, the vehemence to transfer public services to private undertakings has been far more contained.

The prevailing political-ideological differences also determine the manner in which public duties are performed, since historical experience demonstrates that left-wing (socialist, social democratic) parties appreciate public property more so than liberal parties.

Finally, *fashionable trends* have an unquestionable role in the proportions of the respective manners in which public duties are performed. In Europe, for instance, following the 2nd World War, the efficient provision of public services seemed to be feasible via nationalisation, whereas, currently it is carried out through privatisation.

C) Para-administrative organs in Hungary

Under effective law in Hungary, the following organs can be or are considered to be non-public-administrative organs that provide public services: public works, public institutions, public bodies and public foundations. The author treats these para-administrative organs separately, denoting their features and refering to effective pertinent legal regulations.

D) Public services provided by private organs

The chapter on para-administrative organs is concluded with a sub-chapter discussing the performance of public services by private organs. In this context, the author underlines that, in a broader sense, practically all human activities may be considered public services: bread-supply, manufacture of clothing, construction of roads, building of flats, etc. These duties are generally performed by organs of private property, according to the rules of the private sector and under specific control by the state (public administration). The relation of public administration to these private organs is special, since supervision, and parallelly, interference by the state, is facilitated. This is especially valid in those cases, whereby work in the public interest is carried out by private organs on the basis of agreements concluded with public administrative organs for a specific period. In this scope, the author lays emphasis on concession agreements and agreements concerning public services.

Part 5: The Staff of Public Administration

Regarding significance, the most extensive part of the work under survey discusses the issue of staff and let me add, not without reason. I must also admit that staff is the most important constitutive element of public administration. We can form the organisational structure of the public administration of a state most optimally and we can provide for the most auspicious working conditions, but nevertheless, if there is no availablility of adequately trained and motivated staff of officials adjusted to the given function and duty, public administration will be incapable of complying with its social designation.

The author considers the following issues with respect to the staff of public administration: 1. the number and composition of staff, 2. systems of human resource policy, 3. selection in public administration, 4. planned and predictable promotion–career structure, 5. rights and duties of civil servants, 6. the system of responsibility of civil servants, and 7. (further) training of civil servants.

Even a brief introduction of each of these chapters would overreach the narrow scope of the present review. Therefore, in the ensuing text I will rather abide by *pointing out the statements and conclusions of the author that I consider most important*:

– The number of the staff of public administration is determined by several factors (such as the population size and the extension of the territory of the state), which are deemed equally important, as any instance can be used to demonstrate the "powerlessness" of a specific system. In this respect, a further problem is that we can merely assume the comparability of specific categories, which in fact may not correspond. For instance, the content of the terms "civil servant" and "state employee" in Hungary can be quite different in other states of the world.

– The number of employees in public administration and its relative proportion to the number of all employees has increased since the 1880s, which is closely related to the progressively powerful interference by the state, including the sharp growth of the duties of the state (public administration). This tendency is reflected in Hungary as well, although, there have been obvious fluctuations in the recent century.

– The number of staff in public administration per se is not decisive, since we must also observe the composition of the staff with respect to the relative educational level, age, sex and even proportion of politicians and experts. It is worth noting that, in Hungary, the records pertaining to civil servants kept by the Ministry of the Interior is quite expedient.

– Public administration is the most enormous field of work in all countries considering that it employs the highest number of employees. Therefore, the

concept of how employees are taken on and how their situation shapes during work should not be treated indifferently. In this respect, two notably great models of human resource policy systems have evolved; on the one hand, the open system, which conforms to the solutions of the business world, and on the other hand, the closed system, which applies military conceptions in the civil sector; although, the open and closed systems are obviously not maintained in their pure forms. In fact, the experience is that open systems tend to close and closed systems tend to open sooner or later.

– In view of prevalent tendencies, Hungary invariably converted to the closed system, which was regarded as a model (see, Act 23 of 1992 on the Legal Status of Civil Servants) at a time when it started to recede in the majority of developed states.

– The first and most important element of human resource policy is selection.[8] It implies a process targeting the filling of a position and consists of two phases: recruiting and actual selection. During selection, the so-called general employment criteria, such as age, citizenship, moral criteria, state of health and education, are applied, while the so-called social preferences, namely, the principle of representation, affirmative action and political preferences, are also enforced.

– According to the closed system of human resource policy, life-long service is the most favoured solution. In that case, the major stages of the life-course need to be planned, and the respective positions and salaries need to be assigned. Therefore, all those who are employed in the closed system pursue careers. In the modern world, three types of career-structures have evolved. The first projects a continuously rising career from entering into office to retirement. The second, occurs whereby the employee reaches the peak of his/her career, when the organisation can take the most advantage of his/her work (between the ages of 40–50). The career trajectory here reaches an accelerating, followed by a declining phase, and as such advancement is not continuous. The third career trajectory is rarely applied in the public sector, but rather in the private sector. According to this solution, the employee should reach the peak of his/her career, when he/she has the most up-to-date knowledge with some practical experience. This characterises the period from the age of 30 to 35.

– The author considers each of the obligations and rights of civil servants and stresses that, under effective Hungarian law, we cannot find the specification of these under a separate chapter. With respect to the scope of obligations, he

[8] See: more amply the following study by the author: Kiválasztás a közigazgatásban I. és II. (Selection in Public Administration Parts 1 and 2). *Magyar Közigazgatás*, 50 (2000) 321, 449.

discusses the following: fulfilment of duties in a public administrative organ, compliance with directions, retaining information and secrets, exemplary behaviour, lawful and honest work and loyality. The author then distinguishes three scopes of rights. Firstly, the rights that derive from employment, which are due to all employees, such as the right to payment, holidays and various benefits. Secondly, certain rights that are derived from the closed system of career in public administration, such as the right to promotion and employment security. Thirdly, civil servants have political rights, such as freedom of thought, conscience and religion, and rights to trade-unionism and strikes.

– With respect to the training of experts in public administration, the author poses basic questions and subsequently answers them. Just to mention some of these: When should the training take place? (before entering office or during employment?) Should the training involve generalists, who are familiar with all fields, or exclusively specialists, who are employable only in specific fields, and in this respect, what should the subject material of the training be? Who should be involved in teaching? (only theoretical experts or practical experts, as well?)

*

After the introduction of the oeuvre titled "The Basic Institutions of Public Administration", the reviewer has one task left to attend to; to consider the essence of the questions above and give an opinion reflected in a recommendation concerning the excellently systematic and brilliant work exhibiting an enormous volume of knowledge. My recommendation is that it should be examined by all people concerned with, interested in or wishing to acquire knowledge concerning public administration. Since we can have access to all that is worth knowing about this magnificently complex organisational system, activity and staff, thanks to the author and his thorough grounding, knowledge and entertaining style, all we must "merely" do is read his book. Enjoy perusing!

András Torma

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(Győr)
Director, Institute for Legal
Studies, HAS
Member of the European
Academy of Arts, Sciences
and Humanities
Associate Member of the Institut
de Droit International
Research fields:
public international law,
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